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974
No. 2664

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation,
Plaintiff in Error,

vs.

SARAH J. IRVING,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
Eastern District of Washington, Northern Division.

Filed

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Clerk

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys of Record.
DANSON, WILLIAMS & DANSON, Paulsen Building, Spokane, Washington,
Attorneys for Plaintiff and Defendant in Error,
and
GEORGE W. KORTE, Esquire, 608 White Building, Seattle, Washington, and
CULLEN, LEE & MATTHEWS, Hyde Building, Spokane, Washington,
Attorneys for Defendant and Plaintiff in Error. [2*]

*In the Superior Court of the State of Washington,
in and for the County of Spokane.*

SARAH J. IRVING,
Plaintiff,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation,
Defendant.

Petition for Removal.

The petition of the above-named defendant, Chicago, Milwaukee & St. Paul Railway Company, a corporation, respectfully shows unto the court:

That your petitioner herein, said Chicago, Milwaukee & St. Paul Railway Company, was, at the time of the commencement of said suit and still is,

*Page-number appearing at foot of page of certified Transcript of Record.

a citizen and resident corporation of the State of Wisconsin, and was then, and still is, a corporation duly formed, created and organized under and by virtue of the laws of the State of Wisconsin; that its principal place of business is the City of Milwaukee in said State of Wisconsin; that the plaintiff, Sarah J. Irving, was, at the time of the commencement of said suit, and still is, a resident and citizen of the State of Washington; that the above-entitled suit is brought by said plaintiff to recover of said petitioner the sum of ten thousand dollars (\$10,000.00), as damages alleged to have been caused by said petitioner by reason of negligence in the operation of its railroad; that said suit is wholly of a civil nature; that there is a controversy in said suit which is wholly between citizens of different states and that the matter and amount in dispute in said suit exceeds, exclusive of interest and costs, the sum or value of three thousand dollars (\$3,000.00), all of which will more fully appear by the complaint in said suit, which is hereby referred to and made a part hereof; that your petitioner disputes said claim and denies all liability thereon; that the time within which your petitioner is required by the laws of the State of Washington and [3] the rules and practice of said court to answer and plead in said suit has not yet expired; that your petitioner desires to remove this suit before the trial thereof into the District Court of the United States for the proper district, and your petitioner offers and files herewith a bond with good and sufficient surety for its entering in said District Court within thirty days

from the date of the filing of this petition, a certified copy of the record of this suit and for its paying all costs that may be awarded by said District Court if said District Court shall hold that this suit has been improperly removed thereto.

WHEREFORE, your petitioner prays that said surety bond may be approved and accepted and that an order be entered removing said cause to the District Court of the United States for the Eastern District of Washington, Northern Division, and that your petitioner be required to enter and file a certified copy of the record herein in said District Court of the United States as provided by law, and that this court proceed no further in said cause.

(Signed) GEO. W. KORTE,
CULLEN, LEE & MATTHEWS,
Attorneys for Defendant.

State of Washington,
County of King,—ss.

George W. Korte, being first duly sworn, on oath says: That he is the attorney for the petitioner, the Chicago, Milwaukee & St. Paul Railway Company, in the foregoing action; that he is authorized to make and execute this petition and does so on behalf of said petitioner; that he has read the foregoing petition, knows the contents thereof, and that the statements and allegations therein contained are true.

(Signed) GEO. W. KORTE. [4]

4 *Chicago, Milwaukee & St. Paul Ry. Co.*

Subscribed and sworn to before me this 11th day
of November, A. D. 1914.

[Seal] (Signed) F. M. BARKWILL,
Notary Public in and for the State of Washington,
Residing in Seattle, Wash.

[Endorsements]: Petition for Removal. A true
copy of the within Petition for Removal received
and due service of same acknowledged this 13th
day of November, A. D. 1914. (Signed) Danson,
Williams & Danson, Attorneys for Plaintiff. Filed
in the U. S. District Court for the Eastern District
of Washington, as a part of the Transcript on Re-
moval, November 23, 1914. W. H. Hare, Clerk.
By S. M. Russell, Deputy. [5]

*In the Superior Court of the State of Washington,
in and for the County of Spokane.*

SARAH J. IRVING,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation,
Defendant.

Notice of Petition for Removal.

To the Above-named Plaintiff, Sarah J. Irving, and
to Danson, Williams & Danson, Her Attorneys,
Spokane, Washington:

You and each of you are hereby notified that the
defendant, the Chicago, Milwaukee & St. Paul Rail-
way Company, a corporation, will, on the 20th day
of November, A. D. 1914, file in the above-named

court its petition for the removal of said cause to the District Court of the United States for the Eastern District of Washington, Northern Division, sitting in the City of Spokane, Washington, and that it will, at the same time, make and file therewith a bond, with good and sufficient surety, for the entering in such District Court, within thirty days from the filing of said petition, of a certified copy of the record in such suit and for the paying of all costs that may be awarded by said District Court, if said District Court shall hold that said suit was wrongfully or improperly removed thereto.

(Signed) GEO. W. KORTE,
CULLEN, LEE & MATTHEWS,
Attorneys for Defendant.

[Endorsements]: Notice of Petition for Removal. A true copy of the within Notice of Petition for Removal received and due service of same acknowledged this 13th day of November, A. D. 1914. (Signed) Danson, Williams & Danson, Attorneys for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington, as a part of the Transcript on Removal, November 23, 1914. W. H. Hare, Clerk. By S. M. Russell, Deputy. [6]

*In the Superior Court of the State of Washington,
in and for the County of Spokane.*

SARAH J. IRVING,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation,
Defendant.

Bond on Removal.

KNOW ALL MEN BY THESE PRESENTS:
That we, the Chicago, Milwaukee & St. Paul Railway Company, a corporation, as principal, and the National Surety Company of New York, as surety, are held and firmly bound unto Sarah J. Irving, the plaintiff in the above-entitled action, in the penal sum of five hundred dollars (\$500.00), lawful money of the United States, to be paid to the plaintiff, her heirs, executors, administrators or assigns, for which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 11th day of November, A. D. 1914.

WHEREAS the above-entitled suit was brought on or about the 4th day of November, 1914, in the Superior Court of the State of Washington, in and for the County of Spokane, by the said plaintiff against the above-named defendant, and is now pending in said state court, and is removable into the District Court of the United States for the East-

ern District of Washington, Northern Division, and the said defendant, the Chicago, Milwaukee & St. Paul Railway Company, has petitioned said court for said removal.

NOW, THEREFORE, if the said defendant, the Chicago, Milwaukee & St. Paul Railway Company, shall enter in the District Court of the United States for the Eastern District of Washington, Northern Division, within thirty days from the date of the filing of the petition for removal, a certified copy of the record in said suit, and [7] shall well and truly pay all the costs that may be awarded by said District Court, if it shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall be and remain in full force and effect.

(Signed) CHICAGO, MILWAUKEE & ST.
PAUL RAILWAY COMPANY.

By GEO. W. KORTE,
Its Attorney.

NATIONAL SURETY COMPANY,
[Seal] By FRED W. ALLEN,

Attorney in Fact.

[Endorsements]: Bond on Removal. A true copy of the within Removal Bond received and due service of same acknowledged this 13th day of November, A. D. 1914. (Signed) Danson, Williams & Danson, Attorneys for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington, as a part of the Transcript on Removal, November 23, 1914. W. H. Hare, Clerk. By S. M. Russell, Deputy. [8]

*In the Superior Court of the State of Washington,
in and for the County of Spokane.*

SARAH J. IRVING,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation,
Defendant.

**Order Removing Cause to United States District
Court.**

Upon reading the petition and bond for the removal of the above-entitled suit into the District Court of the United States for the proper district, heretofore filed in the above-entitled court, and finding the said petition and bond sufficient in all respects as provided by laws in relation to removing causes from the state court to the District Court of the United States.

It is ordered that the said petition and bond be approved, and accepted, and that said State court proceed no further with said suit; and that said defendant, the Chicago, Milwaukee & St. Paul Railway Company, cause a certified copy of the record in said suit to be entered and filed in the District Court of the United States for the Eastern District of Washington, Northern Division, within the time provided by law.

Signed in open court this 20th day of November,
A. D. 1914.

(Signed) WM. A. HUNEKE,
Judge.

[Endorsements]: Order removing cause to United States District Court. Filed in the U. S. District Court for the Eastern District of Washington, as a part of the Transcript on Removal, November 23, 1914. W. H. Hare, Clerk. By S. M. Russell, Deputy. [9]

*In the Superior Court of the State of Washington,
in and for the County of Spokane.*

SARAH J. IRVING,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation,

Defendant.

Complaint.

Plaintiff complains of defendant and for her cause of action alleges:

I.

That the defendant Chicago, Milwaukee & St. Paul Railway Company is now and was at all the times herein mentioned a corporation, organized under the laws of the State of Wisconsin, and was engaged in operating a railroad between Chicago, Illinois, and Seattle, Washington, and in carrying passengers for hire.

II.

That on or about March 31, 1914, this plaintiff purchased transportation for herself from said Chicago, Milwaukee & St. Paul Railway Company, from Chicago to Seattle, Washington, over the rail-

way lines so operated by the defendant and was accepted as a passenger over said line on or about March 31, 1914, and took passage as aforesaid.

III.

That the said defendant failed and neglected to furnish a reasonably safe roadbed for the said train on which plaintiff took passage and said defendant failed and neglected in operating said train to keep a lookout for obstructions on and defects in the said tract and roadbed and failed and neglected to keep the track in good order and repair and as a result of such failure and neglect the train on which plaintiff was riding left the track and the cars contained [10] in said train and the one in which plaintiff was riding telescoped with the other cars and the said train came to a sudden and violent stop as a result of which this plaintiff was thrown violently from the place which she occupied in the said car and against other portions of the said car and plaintiff received severe, painful and permanent injuries therefrom as hereinafter alleged.

IV.

That plaintiff's arms, back, hips, spine and shoulders were bruised, maimed and lacerated and plaintiff's vertebra and back were sprained and wrenched and her spinal cord and nervous organization were injured and plaintiff sustained a great nervous shock and since the said accident has become nervous and has been unable to sleep as a result of the injuries and at all times has suffered and will continue to suffer great pain and distress and has been unable to perform any work or labor and in the fu-

ture will be unable to perform any work or labor and the said injuries are permanent.

V.

That plaintiff has already expended and will be compelled to expend in the future the sum of \$100.00 for medicines and medical attention and plaintiff has suffered damages as a result of the injuries so received in the sum of \$10,000.00.

WHEREFORE, plaintiff prays judgment against the defendant Chicago, Milwaukee & St. Paul Railway Company, in the sum of \$10,000.00, and for her costs and disbursements herein.

(Signed) DANSON, WILLIAMS & DANSON,

Attorneys for Plaintiff.

State of Washington,
County of Spokane,—ss.

Sarah J. Irving, being first duly sworn, on oath deposes and says: That she is the plaintiff in the above-entitled action; [11] that she has read the above complaint, knows the contents thereof, and believes the same to be true.

(Signed) SARAH J. IRVING.

Subscribed and sworn to before me this 2d day of November, 1914.

(Signed) FRED H. WITT,
Notary Public in and for the State of Washington,
Residing at Spokane, Wash.

[Endorsements]: Complaint. Filed in the U. S. District Court for the Eastern District of Washing-

ton, as a part of the Transcript on Removal, November 23, 1914. W. H. Hare, Clerk. By S. M. Russell, Deputy. [12]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2062.

SARAH J. IRVING,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation,

Defendant.

Answer.

Defendant makes the following answer to plaintiff's complaint:

I.

Answering paragraph one, defendant admits the allegations, matters and things therein contained.

II.

Answering paragraph two, defendant denies that it has sufficient information to form a belief, therefore denies each and every allegation, matter and thing therein contained.

III.

Answering paragraph three, except as hereinafter admitted, defendant denies each and every allegation, matter and thing therein contained.

IV.

Answering paragraph four, defendant denies that

it has sufficient information to form a belief, therefore denies each and every allegation, matter and thing therein contained.

V.

Answering paragraph five, defendant denies that plaintiff has suffered damages as the result of the injuries so received in the sum of \$10,000, or in any sum whatever.

Defendant denies that it has sufficient information to form [13] a belief, therefore denies that plaintiff has expended, and will be compelled to expend in the future, the sum of \$100, or any sum whatever.

For a separate, affirmative answer and by way of defense, defendant alleges:

I.

That if the train referred to in plaintiff's complaint was derailed at the time and place referred to in paragraph three of plaintiff's complaint, that such derailment, if any, was due solely and exclusively to causes and conditions over which defendant had no control whatsoever, and concerning which causes and conditions this defendant had no knowledge whatsoever in time to take any precautions, or to in any wise guard against said derailment.

II.

That if plaintiff was injured at all, at said time and place, that said injuries, if any, were the result of causes and conditions over which this defendant had no control, nor concerning which this defendant had any knowledge whatsoever in time to have taken any precautions, or to have in any wise guarded against the occurrence of the same.

Dated this 18th day of January, 1915.

(Signed) GEO. W. KORTE,
CULLEN, LEE & MATTHEWS,
Attorneys for Defendant.

State of Washington,
County of Spokane,—ss.

W. J. Matthews, being first duly sworn, on his oath states: That he is one of the attorneys for the defendant and makes this verification for and on its behalf; that there is no other officer or agent of the company a resident of the said county cognizant of the facts [14] herein; that he has read the foregoing Answer, knows the contents thereof, and the same is true as he verily believes.

(Signed) W. J. MATTHEWS.

Subscribed and sworn to before me this 19th day of January, 1915.

[Seal] (Signed) B. A. HOFFINE,
Notary Public in and for the State of Washington,
Residing at Spokane, Wash.

[Endorsements]: Answer. Service of the within Answer is hereby admitted this 18th day of January, 1915. (Signed) Danson, Williams & Danson, Attorneys for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington, March 2, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [15]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2062.

SARAH J. IRVING,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation,

Defendant.

Reply.

Comes now the plaintiff and for reply to the answer herein:

I. Denies each and every allegation, matter and thing in paragraphs I to II of the separate and affirmative answer and defense of defendant.

WHEREFORE plaintiff prays judgment as in her complaint.

(Signed) DANSON, WILLIAMS & DANSON,
Attorneys for Plaintiff.

State of Washington,
County of Spokane,—ss.

Sarah J. Irving, being first duly sworn, on her oath says: That she is the plaintiff above named; that she has read the above reply, knows the contents thereof, and the allegations therein contained are true as she verily believes.

(Signed) SARAH J. IRVING.

16 Chicago, Milwaukee & St. Paul Ry. Co.

Subscribed and sworn to before me this 25th day of January, 1915.

[Seal] (Signed) JAS. A. WILLIAMS,
Notary Public in and for the State of Washington,
Residing at Spokane, Wash.

[Endorsements]: Reply. Received a copy of the within Reply at Spokane, Wash., this 26th day of January, 1915. (Signed) Cullen, Lee & Matthews, Attorneys for Defendant. Filed in the U. S. District Court for the Eastern District of Washington, January 26, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [16]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 2062.

SARAH J. IRVING,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff, and fix the amount of recovery at fifteen hundred dollars (\$1,500.00).

(Signed) J. M. GRIFFITH,
Foreman.

[Endorsements]: Verdict. Filed April 28, 1915.
W. H. Hare, Clerk. [17]

*In the District Court of the United States for the
Eastern District of Washington, Northern Divi-
sion.*

No. 2062.

SARAH J. IRVING,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation,

Defendant.

Judgment.

This cause coming on regularly for trial before the undersigned Judge of the above court on April 27, 1915, plaintiff, Sarah J. Irving, appearing in person and by Messrs. Danson, Williams & Danson, her attorneys, and the defendant appearing by its attorneys, Messrs. Cullen, Lee & Matthews and George W. Korte, and the parties having announced that they were ready for trial, thereupon a jury was regularly impaneled and sworn to try the case and plaintiff and defendant produced their evidence and rested; whereupon the case was argued by the respective counsel to the jury and the jury was instructed and admonished and retired to the chamber to consider their verdict, and on April 28th, 1915, returned into court with a verdict in favor of plaintiff and against defendant in the sum of \$1,500.00;

Now, therefore, it is ordered, considered and adjudged that plaintiff, Sarah J. Irving, do have and

recover of and from defendant, Chicago, Milwaukee & St. Paul Railway Company, a corporation, the sum of \$1,500.00, with interest from this date at 6% per annum and plaintiff's costs taxed by the clerk of this court at \$1.85, and that execution issue therefor.

Done in open court this 21st day of June, 1915.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Judgment. Filed in the U. S. District Court for the Eastern District of Washington, June 22, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [18]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2062.

SARAH J. IRVING,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation,
Defendant.

Exceptions to Charge to Jury.

Pursuant to stipulation of the parties to the above-entitled cause, made in open court at the close of trial of said cause, and with the consent and approval of the Court, defendant takes, makes and files exception to the portions of the charge of the Court to the jury hereinafter specified, said exception, under said stip-

ulation, to be considered in all ways as though the same had been made a part of the record of said trial at the time of the retiring of the jury to consider said cause, to wit:

Defendant excepts to the following language and portion of said charge:

“In other words, gentlemen of the jury, taking into consideration all of the testimony introduced before you and presumptions of fact to which I have referred, if you can say that you are satisfied from a preponderance of the testimony here that the defendant company was negligent, the plaintiff is entitled to recover; but if the jury is not satisfied of that fact by the preponderance of the testimony, your verdict must be for the defendant.”

Respectfully submitted,

(Signed) GEO. W. KORTE,
CULLEN, LEE & MATTHEWS,
Attorneys for Defendant.

[Endorsements]: Exceptions. Filed in the U. S. District Court for the Eastern District of Washington, May 17, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [19]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 2062.

SARAH J. IRVING,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation,

Defendant.

Petition for New Trial.

Comes now the defendant in the above-entitled cause and petitions the Court for a new trial of said cause, upon the following grounds:

1. Insufficiency of the evidence to justify the verdict, and that the same is against the law.
2. Errors of law occurring at the trial.

This application is made upon the files and records in said case, and the minutes of the court.

The particulars in which the evidence is insufficient to support the verdict are, among others, as follows:

That the presumption of negligence arising by reason of the fact that plaintiff was a passenger upon defendant's train and was injured by reason of a derailment of the train is wholly overcome by the evidence of defendant to the effect that said derailment was caused by the act of a person or persons not in the employ of the defendant, but trespassers upon the premises of the defendant, for whose acts the defendant is in nowise responsible, and that

plaintiff's injury was in nowise the result of negligence on the part of the defendant. That the plaintiff having offered no evidence proving or tending to prove negligence on the part of the defendant, and the defendant having shown by undisputed evidence that said derailment was not caused by the negligence of the defendant, said presumption [20] of negligence is entirely overcome, and is without force and effect; there is no issue to go to the jury or evidence to support the verdict.

The Court erred in overruling defendant's motion for a directed verdict, and in submitting said cause to the jury.

The Court further erred in charging the jury in the particulars set forth in defendant's exceptions to said charge.

Dated this 17th day of May, 1915.

(Signed) GEO. W. KORTE,
CULLEN, LEE & MATTHEWS,
Attorneys for Defendant.

[Endorsements]: Petition for New Trial. Service of above Petition for New Trial is hereby admitted this 18th day of May, 1915. (Signed) Danson, Williams & Danson, Attorneys for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington, May 18, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [21]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

AND AFTERWARD, on the 21st day of June, 1915, the same being the forty-ninth day of the regular April, 1915, term of said court, court met pursuant to adjournment. PRESENT: Honorable FRANK H. RUDKIN, United States District Judge for the Eastern District of Washington. Among the proceedings had were the following, to wit:

No. 2062.

SARAH J. IRVING,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation,

Defendant.

Order Denying Motion for a New Trial.

This cause came on regularly for hearing upon motion for a new trial; after hearing argument by counsel for plaintiff as well as counsel for the defendant, the Court denied the motion for a new trial, and ordered that judgment be entered upon the verdict, and that defendant be allowed thirty days to prepare its bill of exceptions.

(Entered in District Court Law Journal 5, at page 317.) [22]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 2062.

SARAH J. IRVING,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation,

Defendant.

**Stipulation Extending Time for Filing Bill of
Exceptions.**

It is hereby stipulated by and between the plaintiff and the defendant herein, that the defendant may have sixty days from the 22d day of June, 1915, within which to file and serve its Bill of Exceptions herein.

Dated this 20th day of July, A. D. 1915.

(Signed) DANSON, WILLIAMS & DANSON,
Attorneys for Plaintiff.

GEO. W. KORTE,
CULLEN, LEE & MATTHEWS,
Attorneys for Defendant.

[Endorsements]: Stipulation. Filed in the U. S. District Court for the Eastern District of Washington, July 20, 1915. W. H. Hare, Clerk. [23]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 2062.

SARAH J. IRVING,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation,
Defendant.

Order Extending Time for Filing Bill of Exceptions.

This matter coming on to be heard on the motion of the defendant, for an order extending the time within which to file and serve its Bill of Exceptions in the above-entitled case sixty days from the 22d day of June, 1915, and the Court having read the stipulation of the parties, and being fully advised in the premises,

It is ordered that the time within which to file and serve a Bill of Exceptions may be, and it is hereby extended sixty days from the 22d day of June, 1915.

Done in open court this 20th day of July, 1915.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Order. Filed in the U. S.
District Court for the Eastern District of Washington,
July 20, 1915. W. H. Hare, Clerk. [24]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2062.

SARAH J. IRVING,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-WAY COMPANY, a Corporation,

Defendant.

Stipulation Extending Time for Filing Bill of Exceptions.

It is hereby stipulated by and between the plaintiff and the defendant herein, that the defendant may have to and including the 31st day of August, 1915, within which to file, serve and have certified its Bill of Exceptions herein.

Dated this 28th day of August, A. D. 1915.

(Signed) DANSON, WILLIAMS & DANSON,

Attorneys for Plaintiff.

GEO. W. KORTE,

CULLEN, LEE & MATTHEWS,

Attorneys for Defendant.

[Endorsements]: Stipulation. Filed in the U. S. District Court for the Eastern District of Washington, August 30, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [25]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 2062.

SARAH J. IRVING,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation,

Defendant.

Order Extending Time for Filing Bill of Exceptions.

This matter coming on to be heard on the motion of the defendant for an order extending the time within which to file, serve and have certified its Bill of Exception in the above-entitled case, and the Court having read the stipulation of the parties, and being fully advised in the premises,

It is ordered that the time within which to file and serve a Bill of Exceptions, may be, and it is hereby extended to the 31st day of August, 1915.

Done in open court this 30th day of August, 1915.

(Signed) FRANK H. RUDKIN,

Judge.

[Endorsements]: Order. Filed in the U. S. District Court for the Eastern District of Washington, August 30, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [26]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 2062.

SARAH J. IRVING,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED, That the above-entitled cause came on regularly for hearing in the above-entitled court, on the 27th day of April, 1915, at 10 o'clock A. M., before the Honorable FRANK H. RUDKIN, Judge presiding, the plaintiff appearing in person and by her attorneys, Danson, Williams & Danson, and the defendant appearing by its attorneys, Geo. W. Korte and Cullen, Lee & Matthews, and a jury having been duly impaneled and sworn to try the cause,

WHEREUPON, the following proceedings were had and done, to wit:

Mr. Williams made an opening statement on behalf of the plaintiff and thereafter the plaintiff introduced the following testimony:

[Testimony of Sarah J. Irving, for Plaintiff.]

Mrs. SARAH J. IRVING, the plaintiff, was called as a witness in her own behalf, and having been sworn, testified on direct examination by Mr. Williams as follows:

My name is Sarah J. Irving, fifty-one years old, and live in Spokane. On the 21st day of March, 1914, I left Chicago for Vancouver, B. C., having purchased transportation over the Chicago and Milwaukee Railroad. I boarded the passenger train at 10:15 o'clock on the evening of that day in Chicago, at the Union Depot in Chicago. The train left Chicago at about 10:15 that evening. Q. Did any wreck occur on that train? A. Yes, just after we—well, we were not out of Chicago when there was an awful noise, you know. [27] Q. About how long were you out, about what time were you out from the station before the wreck occurred? A. Well, I can't quite say, but I don't think it was more than twenty minutes, fifteen or twenty minutes. Q. You say it was still in the city? A. Yes, just getting out of the city. At the time of the wreck I was in the toilet-room, ladies' toilet-room, washing, just getting ready to go to bed, and all at once there was an awful noise and the train was thrown back and forwards. I left the train after everybody got out. Everybody, of course, hurried out of the train; I couldn't get out because they were all in the passage way. As soon as I could get out I went out. I was the last one to come out of the train, and I sat down on the lower step, the step

(Testimony of Sarah J. Irving.)

nearest the engine, the front step, it would be. That was not still on the track. The rear part of the coach was on the track. The car that I was in was a tourist car. There was a baggage-coach and a day coach and the engine only ahead of us.

After I got out of the train I could see the engine lying over on the side of the track. Q. What way was the engine pointed at that time with reference to being across the track or down off the grade? A. It was down this way. Our track was here, was on this side of engine, was here on this side, on the inside line, on the inside rail. I think the engine was over two tracks. I only counted three tracks at that place. I don't know how many they would have. Our train was on the outside track, on the right side going out of Chicago, and the engine was pointed to the left, toward the inside. The engine was square across the other several tracks. I did not see the baggage-car at all, it was detached from the engine, and I think it was on the other side, but I did not see it.

The COURT.—The plaintiff is not bound to account for the wreck.

Mr. WILLIAMS.—I so assume, but I wanted to explain one situation about it. [28]

Q. Did you see anything about the rails? A. Yes, I saw the rail—I saw one rail especially. Q. What was the condition of the rail? A. It was standing up, off the ground and turned around. I did not notice anything about the ties.

(Testimony of Sarah J. Irving.)

On cross-examination by Mr. Lee, the witness Sarah J. Irving testified as follows:

Q. You didn't pay any particular attention, I take it, to the condition of the track at that time, at the time you got off the car? A. Well, I saw the rails there. Q. You observed that the front end of the tourist car, in which you were, was off the rails? A. It was off the track. Q. That is, just off slightly, was it not? A. It was half off. Q. The rear trucks of the car were on the rails? A. Yes, I think so. Q. The engine was some distance ahead, was it not, over across the bridge? A. Not at a great distance. Q. Well, two or three, or three or four car-lengths? A. Not so far as that. Q. You didn't go over to where the engine was? A. Yes, I walked up, not quite as far as the engine, I went up to where I could see it; I didn't walk very far, but it seemed like it was quite near the car I was in. Q. Quite a portion of the track that was torn up you observed was beyond where the tourist car was standing, over toward where the engine lay? A. Yes, behind the engine. Q. At the point where the car was off the track did you observe whether the rails were torn up or not? A. I saw one rail standing up. Q. And how far ahead of the tourist car was that? A. I should think the length of the rear car. Q. That was quite badly torn up, was it not? A. Yes, very badly torn up.

(Plaintiff introduced other evidence relating to

the nature and extent of her alleged injury, which is omitted from this Bill of Exceptions.)

Plaintiff rested.

Whereupon the deposition of August Hegger, witness for defendant, was read by Mr. Lee, as follows: [29]

[**Deposition of August Hegger, for Defendant.]**

August Hegger, one of said witnesses, having been duly sworn to testify to the truth, the whole truth and nothing but the truth, testified, on direct examination by Mr. Jefferson, as follows:

My name is August Hegger, forty-nine years old, live at 1747 North Kedvale Avenue, Chicago, Illinois. I am section foreman for the Chicago, Milwaukee & St. Paul Railway Company. During the month of March, 1914, my business was repairing tracks, and so on, such work, fixing bolts, and things like that. At that time I was section foreman. I have been in the railroad service since 1894. At first I was a laborer, then lamp-man, then I went back as section-man and they put me up as section foreman. I have been section foreman since 1900, working all of the time for the Chicago, Milwaukee & St. Paul Railway Company. My duties require me to tighten bolts most of the time. I am now connected with the C. & M. Division, the Chicago and Milwaukee Division, between Pacific Junction and Western Avenue, in the City of Chicago, and am in what is known as the terminal district of the Chicago, Milwaukee & St. Paul Railway Company.

It is about a mile and one-half or two miles from Pacific Junction to Western Avenue on the tracks

(Deposition of August Hegger.)

of the Chicago, Milwaukee & St. Paul Railway Company, and between those points there are four tracks all the way up from Western Avenue to Pacific Junction. The general direction of those tracks is north and south. They are numbered 1, 2, 3 and 4. They commence to number from the east. Track number 1 is the farthest track to the east, and number 4 is the farthest track to the west, My duties required me to keep tracks in repair, tighten the bolts; if anything broke, repair that again, and such work like that. Clean off the dirt and pick up the old scrap, such kind of work. I had at that time three men working under me. My duties required me to always see that the rails were kept straight and the bolts tight. It was my duty to make an inspection of the track. At that time I made an inspection of [30] these four tracks once every day, in the morning. Track number 1 is used for passenger traffic, northbound. Track number 2 was used for southbound passenger traffic, and track number 3 was used for freight going from Galewood towards Western Avenue; in other words, southbound freight traffic. Track number 4 is used for out-bound freight from Western Avenue to Galewood. In March, 1914, and previous to that time, it was a part of my duties to make a daily inspection of these tracks.

As soon as I got in in the morning to the tool-house I gave the men orders what to do, and I take what we call the northbound number 1 track going towards Western Avenue. We looked over the

(Deposition of August Hegger.)

tracks to see if the spikes are out or any bolts broken, anything like that, and if I find anything, send a man over to repair it. In other words, I start at Pacific Junction and walk south on number 1 track. We make the same inspection of the other three tracks. That inspection was done each morning in the month of March. Every morning of the year. We made that inspection on the morning of March 21st, 1914. On the morning of March 21st, 1914, I found track number 1 between Pacific Junction and Western Avenue in good condition; all bolts were in the track and all good and solid. And the spikes were on the rail, and everything. The rails used on this track are 100 pounds to the yard. The rails are bolted together with angle-bars, with nuts; and also what they call the bond wire for them signals over there, the automatic signals that show danger and safety. The rails have been attached to the ties by spikes; both sides four spikes to the tie; that is one outside and one inside, and across is four spikes. Two spikes to each rail on each tie. The ties were oak. The rails thirty-three feet long. I think there were eighteen ties to the rail. The ties are eight feet long and seven inches wide. The angle-bars were twenty-four inches long, and they have 100 pound rails, six inches high, the rail is, and then to fit that. The angle-bars were at least an [31] inch in thickness. The angle-bar has four holes, and each rail has two holes. The angle-bars are fastened to the rails by four bolts, two in each end of each rail, and the bolts are kept in

(Deposition of August Hegger.)

place by nuts. My duties on this tour of inspection, which I made daily, was to see that these nuts were in place, tightened up, and that the bolts were in place, and the angle-bars in place. The 100 per cent angle-bar is the one used in connection with the hundred pound rail. Potomac Avenue is about four or five blocks south of Pacific Junction. Yes, I remember the happening of an accident near or south of Potomac Avenue, on the night of March 21st, 1914, when train number 15 of the Chicago, Milwaukee & St. Paul Railway Company was derailed, at that point. I was at the wreck myself after it happened, but did not see the accident when it happened. I arrived an hour and one-half afterwards. When I arrived at the point of the accident, I saw Mr. Rupp, superintendent of terminals. I also saw there, Mr. Bush, assistant superintendent; and Mr. Burk, the road-master; Mr. Lemke; and this gentleman over there, I don't know his name; Mr. Hasenbalg, train-master. The rails at this point, south of Pacific Avenue, were put in between 1912 and 1913. They were put in at that time under my supervision.

On cross-examination by Mr. Long, the witness, Mr. Hegger, testified as follows:

The Chicago, Milwaukee & St. Paul trains go out of the Union Station, in Chicago, in a northerly direction, toward Pacific Junction, and come first to the Western Avenue Station. Pacific Junction is north of that. Western Avenue is about three miles from the Union Station. It is three miles,

(Deposition of August Hegger.)

maybe more, from Western Avenue to Pacific Junction, so that it is about six miles from Pacific Junction to the Union Station. This accident, on March 21st, 1914, was about five blocks south of Pacific Junction, about a mile and one-half or two miles north from Western Avenue. At the place of the accident the tracks have a kind of a curve all along the track, from Kedzie [32] Avenue on to Pacific Junction, pretty near, a kind of a curve all along. From Kedzie Avenue to Pacific Junction is about a mile and one-half a little more maybe. The track curves easterly; as the train goes northwardly on these tracks, the train heads easterly slightly. At Potomac Avenue there isn't much of a curve, a half inch. I mean half an inch elevation, I don't know what they call that curve. A half inch elevation, that is, the tracks on one side are higher than the other. I don't know what they call the curve. The westerly rail, as you go north, is about half an inch higher than the easterly rail, which was true on all of the tracks numbered one to four. The roadbed is elevated at Potomac Avenue. The roadbed is not elevated all the way from the Union Station to Pacific Junction. It is elevated from Western Avenue to Pacific Junction. My jurisdiction was from Western Avenue to Pacific Junction, during the whole of which distance there is a slight curve, as I have described. My jurisdiction extends north of Pacific Junction two blocks. The railroad is elevated I think about fourteen feet from Western Avenue to Pacific Junction. It is filled in solidly between streets. At the time of the

(Deposition of August Hegger.)

accident there were no other tracks there than these four, that I have described. There is one now. That is, within the yard limits. I don't know whether there was any watchman or lookout along these tracks at or near Potomac Avenue. During the time that I was on duty, they came around once in a while there, but not all the time. I did not see him every day, but they have been around there several times during the week. I often saw them. There is not a lookout, not a little building; nothing of that kind. There is not a switching apparatus, or anything of that kind. There was nothing to prevent the engineer or fireman on a train going north, as they approached Potomac Avenue, that would prevent them from seeing the track. I don't know the speed of the train at that point. I do not know what time this accident occurred, or how long the train had been out of the Union Station. I know [33] nothing of the accident itself. I arrived about an hour and one-half after the time I understood the accident to have taken place. It might have been longer, I don't know just exactly. The tool-house I referred to is near Pacific Junction tower-house. They have a brick tower there that throws switches. Q. Can the man in the tower-house see the tracks? A. Not as far up as there; not as far up as Potomac Avenue. That is quite a distance, and it is kind of a curve, and a lot of trees alongside there along the track. There is no tower-house or lookout of any kind near Potomac Avenue. The nearest lookout is four blocks south

(Deposition of August Hegger.)

of Pacific Junction, I mean four blocks south of Potomac Avenue. This is Kedzie Avenue. It is about two miles from Kedzie Avenue to Pacific Junction. There is no tower-house between Kedzie Avenue and Pacific Junction. There is no other kind of lookout between those points. ,

Q. Is there any obstruction to the view when you are on the track going northwardly, and before you reach, and as you approach Potomac Avenue? A. Telegraph poles; that is all there is. The track is fenced in on both sides from Kedzie Avenue to Pacific Junction. Sure, there is a way to get from the street to the elevation; they can crawl up on the wall, on that bridge wall, you know; it is laid out a little farther on the side, it is about four feet high, they can jump up, get up. From the gound to the top of the elevation the constuction is cement walls where the bridges are on, the iron construction is on. The walls go down kind of slanting, and then set out a little on the bottom. The iron work of which I speak is over the street, and rests on these cement walls. One getting up on top of the elevation would simply have to scale the wall, that is fourteen feet high. To get up on top of the elevation at the street you have to go down the bank; that is, the construction is just as wide as the street is wide, that is all; the rest is gravel on the track, that is, just the wideness of the street. The street runs under the railroad. There is a cement wall on both sides up to [34] the elevation, so that at the street you would have to skin up the wall to get to

(Deposition of August Hegger.)

the top of the elevation.

The tool-house to which I referred is at Pacific Junction. I first give the directions to the three men under me at the tool-house in the morning, and then start southwardly on track number 1 to Grand Avenue, then go north on number 2 again toward Pacific Junction, then back on number 3 to Grand Avenue, and on number 4 to North Avenue. It takes me an hour and one-half or two hours to make that inspection.

Q. You do not stop to get down to look at the connection between the rail, do you, on these trips? A. Yes, sir. Q. Do you? A. Yes. Q. You stop at the end of every rail? A. Not every rail; if I see what I think is not right, I look it over, and if the track is low, I lay down and look over that, too. Q. Well, do you or not, in your inspection trips, stop at the end of every rail? A. Not every rail; I look at every joint and see if the bolts are loose and everything. Q. Do you stop as you walk down the track? A. No, not every time, stop, no. Q. That is what I mean. A. No, I don't stop after every joint. Q. How high is the rail above the cross-ties? A. Six inches. Q. Do you walk in the middle of the track on these inspection trips? A. In the middle of the track. Q. Can you see the spikes that hold the rail on the ties on the outside of the track as you walk down? A. Not all of them. Q. No? A. But I see the inside getting away. I can look on the outside if they are getting away. Q. If a spike was out on the outside of the rail you might not see

(Deposition of August Hegger.)

it when you were walking in the middle of the track?

A. I might miss one here and there, not very many.

Q. The weight of the train, or the pressure from it is from the inside out, is it not? A. Yes. If a spike was out, the train would spread the track outwardly. It might result in derailment. As to the length of time these ties have been on this track, they are always getting every year renewed, you know, when they are rotten we put another one [35] between some there may be two years, some may be four years, some may be five years or six, I don't just remember all that. When the train was derailed the cars were on the east side of track. I have a distinct recollection of walking down this track on the morning of the 21st day of March, 1914. I do not say because that was my custom. I remember that distinctly. That morning we started at seven o'clock, then I gave the men the work, and then I walked up; I don't know just what time I would get there. I think it was between seven and eight o'clock in the morning, of the 21st of March, 1914, that I walked down. I don't remember whether I stopped at Potomac Avenue that morning. I don't remember whether this track number 1 had been used by other trains frequently during the day of March 21st. On that day I did not see very many people on the track besides myself. I saw the repair men of the signal department. I did not see anybody there except the men working for the railroad in and about their work.

The engine was off the track when I arrived at the

(Deposition of August Hegger.)

scene of the accident. It was lying across the tracks, headed west. I think the next car to the engine was the baggage-car, and it was laying down the bank, east. I don't know whether it was on Potomac Avenue; it was just off the other side of the bridge, north of Potomac Avenue bridge, I mean south of Potomac Avenue, a little south of the bridge. I don't remember how far that car was from Potomac Avenue. The engine was north of Potomac Avenue on the other side of the street.

When I came there the other cars of the train were pulled out, they were gone; the wreck was pretty near cleared up; the cars were all back, only they picked that baggage-car up when I came. All of the passenger cars had been taken away when I got there, and the men were working repairing the track. I made no inspection of track number 1 after this early morning inspection of March 21st, during that day. I left my work at 5:30, and I was not back there after that time.

On redirect examination, by Mr. Jefferson, Mr. Hegger testified as follows: [36]

Between Kedzie Avenue and Pacific Junction there are semaphore signals on the right-hand side, on the east side of the track, of track number 1. These signals control the movement of trains running on track number 1. Between Kedzie Avenue and Pacific Junction there is one semaphore at Spaulding Avenue, one on Division and North Avenue, and Wabansia Avenue. The trees that I spoke of as obstructing the view, looking south from

(Deposition of August Hegger.)

Pacific Avenue toward Potomac Avenue, are not on the right-of-way of the company. There are some of them people that have yards there. They are on the east side of the street, and then some on the alleys, you know. On the morning of the 21st of March, 1914, as to whether the ties were rotten or not, they were all in good condition, so far as I know. There is now, but not at that time, a switch-track or cross-over track immediately south of Potomac Avenue Viaduct, leading from track number 1 to the other tracks. There was not any such track or cross-track within four hundred or five hundred feet south of Potomac. When I made the inspection on the morning of the accident, walking south, I observed the spikes were all in the ties, and were secured to the rails, and as to the angle-bars, the bolts were tight, and the nuts were all tight on, that is all the further I could know.

On recross-examination by Mr. Long, Mr. Hegger testified as follows:

Q. Are not the nuts on the bolts, on the angle-bars on the inside—or outside of the track? A. Well, there are two inside and two outside. Q. You could not say whether the nuts were on the bolts on the outside of the track, as you walked down the center, could you? A. No, I cannot, but I can *work* over and look at it. I can walk towards the rails so close that you can see both sides. Q. Did you walk from one side of the track to the other side, so as to look over at the outside nuts? A. Where the joints are, yes. Q. Every time? A. Where the joints are, yes.

(Deposition of August Hegger.)

Q. And those angle-bars connect at every rail, that is, there are two angle-bars? A. Yes, they run each [37] way, and there are two bolts. Q. And there is an angle-bar about every— A. About every thirty feet, maybe thirty-three feet. Q. Thirty-three feet on each side? A. Yes. Q. Did you walk over at each thirty-three feet on each side and look at the nuts on the bolts, at each place? A. Yes, sure. Q. On that morning? A. That morning, and every morning. Q. You have a recollection, do you, of having looked at the bolts on every angle-bar on both sides— A. Every morning. Q.—of the track that morning? A. Yes. Q. Do you know how far it is from Potomac Avenue to the city limits of Chicago, north? A. I do not know how far it is from the city limits of Chicago, north. I don't know just where the city limits is, north. Potomac Avenue is within the city limits, and it is considerable distance from the city limits, about five miles, I guess. Q. Is it densely settled and populated at this place? A. Well, it is building up there now, lately, now. Q. I mean, was it in 1914? A. Yes. Q. It was thickly settled? A. Yes. Q. Much traffic on the streets? A. Not there yet; there is a school down there close by.

On further examination by Mr. Jefferson, the witness testified as follows:

The public did not pass up and down these tracks as they were elevated, and the rails of this north-bound track number 1, as well as the rails of the other three tracks, were laid in "broken joints." By

(Deposition of August Hegger.)

"broken joints," I mean that the joints of the two rails were not opposite each other, so that it was not a very difficult matter to observe these joints as you passed along, inasmuch as they did not occur at the same place in each rail.

Further examination by Mr. Long, the witness testified:

Q. Did you zigzag down the track from one side to the other as you walked southwardly on March 21st, 1914, or did you walk down the center of the track? A. Wherever the joint is, I go over [38] on that side and at the bolts right on the outside where I can see them. Q. Then you did not walk down the center of the track? A. I zigzagged on the way.

On further examination by Mr. Jefferson, the witness testified:

Q. As you walked down the track, walking diagonally from one joint on one rail to the joint on the other— A. Yes. Q. —on the morning in question, was there anything to obstruct your view from observing whether the nut-locks were off the bolts, connecting the joint of the rails; whether the nuts were on the inside or on the outside of the rails? Was there anything to obstruct your view? A. No. Q. You could see plainly? A. Plainly.

[**Deposition of A. J. Hasenbalg, for Defendant.**]

The deposition of A. J. HASENBALG, a witness on behalf of the defendant, was then read by Mr. Lee. On direct examination by Mr. Jefferson, the witness testified as follows:

(Deposition of A. J. Hasenbalg.)

My name is A. J. Hasenbalg; I am thirty-eight years old; live at 4453 Irving Park Boulevard, Chicago. My present occupation is train-master, Chicago, Milwaukee & St. Paul Railway Company. This was my occupation in March, 1914.

I recall the accident to Train Number 15 on track number one, near Potomac Avenue on the night of March 21st, 1914. I did not witness the accident. I cannot say how soon after the accident I arrived, but it was about an hour. When I arrived at the accident the rear end of the train had been taken back to Western Avenue. I observed the position of the front end of the train. My recollection of how the cars stood on the front end is about the same as that of Mr. Rupp and Mr. Bush, to which they have testified. I observed the rails on track number 1 south of Potomac Avenue. Counting the rails from the Potomac Avenue Viaduct, I observed that rail number 3 had been disjointed from rail number 4. Both angle-bars were missing. The outside spikes of the south rail were pulled for some distance back.

[39]

Mr. LONG.—I object to that statement and move to strike it out.

Mr. JEFFERSON.—Well, if he says they were missing—

Mr. LONG.—Well, he said that they were pulled.

The WITNESS.—They could not have been missing unless they were pulled.

Mr. LONG.—Well, they might be.

The WITNESS.—Well, they were missing, the

(Deposition of A. J. Hasenbalg.)

spikes on both sides of the receiving-rail were missing for about half a rail length, and the receiving-rail was shoved in.

Mr. LONG.—I object to the statement that it was shoved in, and move to strike it out.

Mr. JEFFERSON.—Go ahead.

A. Well, the receiving-rail was—I do not know how you would say that. The receiving-rail was out of line. It was in about two inches. According to my recollection, it was in about two inches, or nearly the width of the ball of the rail. The end of the receiving-rail had very deep marks where it had been struck by the flanges of the forward wheels of the engine.

A. I did not notice whether there was anything between the ends of the rails. I could not say from my recollection at this time. In looking over the ground to determine the cause of the accident, I found, among the weeds, probably three or four feet of this joint, angle-bars and bolts and spikes. At this time, I did not find anything else besides that. But later, the following morning, about daylight, looking the ground over further, I discovered a claw-bar and a track wrench, concealed on the abutment of the viaduct over Division Street. A claw-bar is an instrument used by trackmen for removing track spikes.

Mr. LONG.—I move to strike out the answer of the witness, on account of the location of the finding and the time of the finding. It is wholly irrelevant and incompetent. [40]

(Deposition of A. J. Hasenbalg.)

Mr. JEFFERSON.—Q. What did you say the claw-bar was?

A. An instrument used by trackmen to pull out spikes. A wrench is an instrument used to remove the nuts from track bolts, bolts used in fastening angle-bars, and I found these in the Division Street Viaduct, which is on top of the abutment. There is a space of about eighteen inches between the top of the abutment and the bottom of the bride structure. I do not have any personal knowledge of those being used to remove the track or unloosen the angle-bars at the point of derailment, but the instruments I did find are those in common use by railroad trackmen to remove spikes and nuts from rails.

Those articles which I found in the weeds were found shortly after I arrived there, and they were on the east side of the east rail of track number 1, almost directly opposite the point of the derailment, or where the track was disjointed. At that time the wrecker was not working there. It had not got there yet. When the wrecking engine did come, it worked on the north side of Potomac Avenue. The articles that I found were south of Potomac Avenue, in the weeds, and about opposite the point where the rails were disjointed. I did not make any examination of the track further south, that is, track number 1. These bolts that I found did not show any evidence of having been broken off. There was nothing wrong with them; they were our standard pattern of track bolt, and such a bolt as is used to attach the angle-bar to the joint of a rail.

(Deposition of A. J. Hasenbalg.)

On cross-examination by Mr. Long, the witness, Mr. Hasenbalg, testified as follows:

I did not measure the distance between the south disjointed rail and the rail on the west side of track number 1, nor did I measure the distance between the receiving disjointed rail and the rail on the west side of track number 1.

Q. Was the tourist sleeping-car over these disjointed rails at that time? A. The tourist car had been removed before I got there. I was not there when they re-railed the tourist car. I [41] was only describing conditions which I saw to exist after the sleeping-cars had been removed, and when I arrived there. Between this tourist car, which was south of the avenue, and the engine, which was north, there were two coaches and the baggage-car down the bank. They were north of the avenue. They were north of the break in—north of Potomac Avenue, north of the break in the rail. As to their being south of Potomac Avenue, I could not say clearly, but my recollection is that one end of one of them stood in the bridge or on the bridge. There was no car on the track over Potomac Avenue, or in the street below, in Potomac Avenue.

Q. Without having made the measurements between these rails at the point where they were disjointed, I mean from the west rail to the east rail on the east track, you cannot say, can you, that the receiving-rail was in two inches, or that the south rail was out two inches? A. Yes, sir. Q. Without having made the measurements? A. Yes, sir. Q. The

(Deposition of A. J. Hasenbalg.)

spikes were out on both sides of the south rail, as I understood you? A. Yes, sir. Q. For how far? A. The south rail. No. The outside of the south rail. Q. The outside of the south rail? A. That is my recollection. Q. Back for how many feet? A. I could not say, positively, but for some distance. Q. And then out on both sides of the receiving-rail? A. Yes, sir.

I could not say how far Division Street is from the scene of the accident, exactly. I think it is a long block. It is the first viaduct east or south of Potomac Avenue. I could not say how many feet in a long block. I don't believe I could make a guess that would be anywhere near it. I do not know how the claw-bar and the track wrench came to be found there.

Q. Is there any mark, or way of identifying the claw-bars and wrenches of the Chicago, Milwaukee & St. Paul Railway Company? A. They have the initials stamped on them on the side. Q. Were these things so stamped? A. I don't know. Q. That discovery was on the morning of the 22d of March? A. Yes, sir. [42]

On redirect examination by Mr. Jefferson, Mr. Hasenbalg testified as follows:

Q. At about daylight? A. Yes, about that. Q. And you remained at the point of the accident all night? A. Yes, sir.

The deposition of Mr. P. L. Rupp a witness on behalf of the defendant, was read by Mr. Lee; after having been sworn, testified on direct examination by Mr. Jefferson, as follows:

[Deposition of P. L. Rupp, for Defendant.]

My name is P. L. Rupp, I am fifty-three years of age, and reside in Chicago. Since 1908 I have been superintendent of terminals for the Chicago, Milwaukee & St. Paul Railway Company. I have been in the railroad business for thirty-eight years. Superintendent of terminals of the Chicago, Milwaukee & St. Paul Railway Company, in the city of Chicago, includes the track from Western Avenue to a point north of Pacific Junction to the north, and Bensonville on the Council Bluffs Division, west of Pacific Junction, and that embraces track number 1 as it passes over Potomac Avenue. I remember the accident caused by the derailment of the engine and tender of train number 15 on the night of March 21st, 1914. I did not witness the accident, but I was present soon after, probably thirty or thirty-five minutes after it occurred.

I found the engine lying crossways of the four main tracks, just north of Potomac Avenue. The tank of the engine was down the embankment on the east side of track number 1, north of Potomac Avenue, upside down. The baggage-car was partly down the embankment, but not overturned, on the east side and north of Potomac Avenue. The two day coaches and the forward truck of the tourist car were off the track. The balance of the train was on the rails. When I started from my home I went direct to the coach-yard and got a switch-engine there and went to the scene of the accident, and had this switch-engine rerail the forward truck of the

(Deposition of P. L. Rupp.)

tourist car. I took it with the other cars that were not derailed, to Western Avenue [43] coach-yard and made up the head end of the train and started that train at 12:35 A. M. By removing the pilot of the derailed engine, we cleared number 4 track. The forward trucks of the tourist car, that is, the trucks on the north end of the car, the direction in which it was going, were off the rails. The entire truck was off the rails, but the wheels were within three or four inches of the rail, so that by putting a switch-engine on the other end and using frogs we were able to draw them back on to the rails. I gave my entire time to the arranging of the new train and getting it out, in connection with clearing the track, which took until eight o'clock the next morning.

Q. Did you make any examination or observation of the rails at the point of derailment at the time?

A. I found where the joints had been opened and an angle-bar placed between those, or in this opening, which caused the derailment.

Mr. LONG.—I object to the witness' statement.

Mr. JEFFERSON.—Q. Just state what you saw, Mr. Rupp, please.

Mr. LONG.—And I move that that be stricken out.

The WITNESS.—The angle-bar in this opening, I saw that. That was about midway underneath the tourist car.

Mr. JEFFERSON.—Q. Is there anything further that you wish to enlighten us on in connection with the accident, with reference to what you saw your-

(Deposition of P. L. Rupp.)

self at that time? A. That is about all I saw as far as the track was concerned.

I saw Mr. Burke there; Mr. Burke arrived there shortly after I did. No repairs that I know of were made on the tourist car; it went on in the new train.

Mr. LONG.—That is objected to.

None of the cars had been telescoped. It was a steel train from the cow-catcher to the end of the train. [44]

On cross-examination by Mr. Long, the witness, Mr. Rupp, testified as follows:

Q. Were there any cars on the bridge across the street? A. The baggage-car evidently went across the bridge. There was not any of the cars thrown across the bridge; they were in that position when I got there. The engine was across the tracks, and the tender and baggage-car were on the side of the embankment, north of Potomac Avenue. The rest of the train was south of Potomac Avenue. There was no obstruction, or nothing to prevent the engineer and fireman from seeing the track as they approached this point.

Q. Was there anybody whose duty it was to be on the lookout as to the trains and tracks within view of this place that evening? A. We have no track-walkers at night. Q. And nobody stationed so that they could see the track? A. No, not for that purpose. Q. There is no elevated switching device,—or what do you call that? Interlocking device, that is near this point? A. There is an interlocking plant

(Deposition of P. L. Rupp.)

north of Potomac Avenue known as the Pacific Junction Interlocking Plant. That is probably half a mile, maybe not that far, from Potomac Avenue. Trains do not slow down as they approach Pacific Junction if they have their signals.

Q. You do not know, of your own knowledge, what signals, if any, were given on this occasion, do you?

A. I did not see any signals given. I arrived at the scene of the accident in the neighborhood of eleven o'clock. I got a telephone message at my residence, at number 3135 Washington Boulevard. It takes me from eight to twelve minutes, under normal conditions, to get to the coach-yard. I can walk it in seventeen minutes. I stayed at the coach-yard probably a minute or two. The coach-yard is between Western Avenue and the scene of the accident. I did not take up the wrecking derrick and apparatus of that kind; I just left there with a switch-engine, in order to get out to the ground as quickly as possible. When I arrived I presume I saw at least fifteen or twenty people [45] about the scene of the accident. They were passengers. No trackmen or employees of the railroad had arrived at that time, except the crew that I had with me, consisting of five men.

The deposition of W. C. Bush, a witness on behalf of the defendant, was then read by Mr. Lee. Having been first sworn, Mr. Bush, on direct examination by Mr. Jefferson, testified as follows:

[Deposition of W. C. Bush, for Defendant.]

My name is W. C. Bush, I am fifty-two years old, live at number 3223 Warren Avenue, Chicago. My present occupation is and was during the month of March, 1914, assistant superintendent of terminals in Chicago for the Chicago, Milwaukee & St. Paul Railway Company. I have been assistant superintendent of terminals for five years. Before that I was agent for the Chicago, Milwaukee & St. Paul for about twenty-seven or eight years. I was agent in the Chicago terminals five years at Galewood Transfer House. That is the Galewood that has been mentioned in this testimony, by the witnesses. As Mr. Rupp's assistant, my territory covers the same territory that he has mentioned. I recall the accident in question. I did not see the train wrecked. I arrived there about forty minutes after the accident. I saw Mr. Burke and Mr. Rupp and Mr. Hegger there. I observed the position of the cars in the train when I got there. None of the cars had been removed when I arrived there. Shortly after I got there they were. The position of the cars, as Mr. Rupp stated, would be my statement. I personally observed the rails of track number 1 south of Potomac Avenue. I made an examination immediately after I arrived at the scene of the accident.

Q. What did you notice with reference to the joint between the third and fourth rails south of Potomac Avenue, being the east rail of number 1 track? A. The receiving-rail; the angle-bars had

(Deposition of W. C. Bush.)

been removed from the receiving-rail; the spikes—

Mr. LONG.—I move to strike out that part of the answer in which the witness says that the angle-bars had been removed. [46]

Mr. JEFFERSON.—Yes, I guess that may be stricken out.

The WITNESS.—Well, the angle-bars were gone, they were not on there. The angle-bars were gone from the point. The spikes were out of the ties on the inside of the receiving-rail for six or eight ties. The receiving-rail was moved over so that the flange of the engine wheel had struck close to the outer edge of the ball of the rail, and the mark on the rail where flange had gone till it had dropped on to the ties. I then saw where the wheels had gone across the viaduct, and then the engine turned over.

Q. Did you notice anything between the south end of the receiving-rail and the north end of the first rail south of it? A. Well, I am not positive as to that. I think that the angle-bar was in there, but I do not remember. That was not clear in my mind, but the other part was. I remember the other distinctly.

As assistant superintendent of terminals, I am familiar with the movements of trains that passed over that track northbound, say from five o'clock in the afternoon until the time of the accident. Q. Well, now, what trains, if you know, passed over that track northbound between five o'clock in the afternoon and the time of the accident, what trains? (rest of question omitted.) A. C. & M. Division

(Deposition of W. C. Bush.)

Train number 9 would be the first train leaving the Union Depot at five o'clock. Q. What kind of a train was that? A. That is a passenger train. I will give the passenger trains first. We only have a couple of freight trains there; then C. & M. Division number 36, leaving there at 5:15. Then we have a Bluffs Train number 31, leaving the depot at 5:20, and number 37 leaving there at 5:25. Then C. & M. Division number 141, leaving there at 5:35, and number 143, leaving there at 5:45. Then the next train leaving there would be Bluffs number 5, leaving there at six o'clock. Bluffs Train number 11, leaving there at 6:05, and Bluffs number 39; leaving there at 6:20. Then comes C. & M. Division Train number 1, leaving there at 6:25, and C. & M. Division number 101, leaving there at 6:35. [47] That is the Pioneer Limited. Then comes C. & M. Division number 145, leaving there at 6:42. Then C. & M. Division number 37, leaving there at 8:45; then C. & M. number 3 leaving there at 9:25, and C. & C. B, number 3, leaving there at 9:50. Then comes C. & M. number 15, this train that was wrecked, leaving there at 1:15. Number 57, our fast mail, leaves at 9:55. In addition to those we have two work trains, using number 1 main, leaving Western Avenue; one leaves at 5:25, and the other leaves at 6:25, going to Galewood on the Bluffs Division. Then we had at that time a freight train, C. & M. number 65, leaving Western Avenue at eight o'clock, and Janesville Line number 165, leaving there at nine, all using number 1 main.

(Deposition of W. C. Bush.)

Northbound, we have a couple of merchandise pulls, that use number 1 main; they leave Union Street about 7:30 and pass Pacific Junction about 7:50. These passenger trains are all scheduled from 15 to 20 minutes between the Union Depot,—18 to 20 minutes between the Union Depot and Pacific Junction. The more important trains have a ten-minute schedule from the Union Depot to Western Avenue, and the suburban trains have a schedule of twelve minutes, to Western Avenue. That makes them two minutes slower, and then their time is probably a minute more between Western Avenue and Pacific Junction. Number 15 on the night of March 21st, 1914, left the Union Depot, in Chicago, right on time, 10:15. This train stopped at Western Avenue that night. That would bring it to the point of the accident about 10:28, that is about twelve minutes. They have a ten-minute schedule to Western Avenue; about 10:29, that is three or four blocks, and their schedule by Pacific Junction is 10:30 or 10:31. I presume that was about 10:29 instead of 10:28. Yes, sir. I observed the forward trucks of the tourist car. They were off the track. The wheels were just off the rails three or four inches. It only required a frog to put those on. The rear trucks were on the track. I do not know of any repairs being made to that tourist car before it was put into the new train to go out. [48].

Q. Do you think of anything else, Mr. Bush, in connection with this hearing? A. No, sir.

(Deposition of W. C. Bush.)

On cross-examination by Mr. Long, the witness, Mr Bush, testified as follows:

At that time the schedule of train number 15 from the Union Station to Western Avenue was ten minutes. The distance is about three miles from the Union Depot to Western Avenue. The schedule from Western Avenue to Pacific Junction was ten minutes. My remembrance is that it is about two miles. It is over two miles, between two and three miles. Of course, that includes a stop at Western Avenue. That is a schedule of twenty-five minutes from the Union Station to Pacific Junction, with the one stop at Western Avenue. They leave the Union Depot at 10:15 and go by Pacific Junction at 10:31. It is a schedule of sixteen minutes. That would be a schedule of six minutes for the two miles between Western Avenue and Pacific Junction.

Q. You don't remember distinctly whether there was an angle-bar between the two rails at the place of the derailment or not, as I understand you? A. Well, as I said, I would not say positively. Since the gentlemen have been speaking of it, I have thought that that is right, but I would not state positively.

On track number 1, beyond the point of derailment the rails were torn up. Where the engine—as the engine went over the viaduct, she struck the side of the viaduct, which prevented her from going into the street, and she careened through that viaduct and then whirled and just went and slid along with her wheels towards the way she was going, ly-

(Deposition of W. C. Bush.)

ing on her side, and she tore up two or three tracks as she slid for about 100 feet. I think it was about 100 feet from the place of derailment to where the engine laid. I think she was about 100 feet away from the viaduct, on the other side, north of the viaduct. The engine was when she stopped about 225 [49] or 230 feet—about 230 feet from where she went off the track.

Q. Now in that distance of 225 feet, the rails at places were torn up? A. After she went through the viaduct she tore up the rails, yes, sir. South of the viaduct I did not see any rails torn up except where this rail had been taken out, where the rail was moved over. Q. You don't know who moved that over, of your own knowledge? A. I wish I did, I would get \$500.00. Q. Were there other broken angle-bars about the scene of the accident? A. Well, now, I don't remember about the track north of the viaduct. I know the rails, big 100 pound rails, were bent almost double, and of course there must have been some angle-bars broken, in order to pull them out from the track. Q. Is that your best recollection, that the rails were bent and that some angle-bars were broken? A. North of the viaduct, yes, there was. Q. Any loose spikes around there? A. There was some spikes, if I remember right—there was some spikes lying where these spikes had been pulled out, where the holes were in the ties, where the spikes had been pulled out of this receiving-rail that was moved over.

Q. You never saw those pulled? A. I saw the

(Deposition of W. C. Bush.)

holes where the spikes had been. Q. You do not know but that a trackman had pulled those out, so far as your own knowledge is concerned, do you? A. Yes. Well, now, you see—of course I did not see the trackmen pull them. Q. You did not see anyone pull them, did you? A. No, I did not. The bonding wires were not broken either. The bonding wires were broken where the rails had been bent up, after the accident.

Q. You do not know of your own knowledge anything about the speed of the train, or whether—of this train at the time of this accident—or whether they had a headlight, or anything of the kind? A. Yes, there was a headlight, because we picked up the headlight afterwards. It was an electric headlight. The engine was practically stripped at the time, after the accident, and the speed limit is twenty-five miles an hour across Pacific Junction crossing. I do [50] not know how fast this particular train was running. I could not say whether the headlight was lighted or not. If it is on a straight track the headlight would throw a light quite a long distance. Well, on a track I should imagine it would throw it, in a straight direction, three or four blocks. It is my impression that with this slight curve there, that the reflection from the headlight—it would be questionable whether the reflection of the headlight would be on that receiving rail. I am not positive about that. I would not make a positive statement unless I rode an engine there to see. I do not know definitely, but with a little curve, of course we know that the light shines di-

(Deposition of W. C. Bush.)

rectly ahead of the engine, and if the engine is on a little curve, it would naturally reflect the light away from the inner rail of the curve. That would depend of course on the extent of the curve, and the distance between a given point that you are looking at and the position of the engine.

Michael Burke, being called as a witness on behalf of the defendant, being first duly sworn, testified, on direct examination by Mr Lee, as follows:

[**Testimony of Michael Burke, for Defendant.]**

My name is Michael Burke, I am fifty-six years old, and live at 1802 North Keller Avenue, Chicago, Illinois. I have been road-master and building track, construction, for the Chicago, Milwaukee & St. Paul Railway Company for the last sixteen years. I have been engaged in the railway business for forty-two years. Aside from being road-master, I have been engaged principally in building track, grading track, construction work and maintenance of way. On the 21st of March, 1914, my duties as road-master were to see that the track was always in proper condition. I have about 289 miles of track under my jurisdiction. In fact, I have got all the superintendent has got in the Chicago terminals. My jurisdiction includes the portion of the track between Western Avenue and Pacific Junction, where this accident occurred. We have got four [51] tracks there. The curve at that place, I should say, is about one degree, not over one degree.

Q. And by a one-degree curve you mean that it

(Deposition of Michael Burke.)

is one degree in one hundred feet? A. No, one degree would mean—well, 360 degrees in a circle, it would be that part of a circle. Q. Yes, but for what distance would—that is, for what distance would give you the radius of the circle? A. Well, now to define it rightly, if you take a 62 foot string and string it on the inner side of the outer rail or the inner side of the lower rail, to the middle of the quadrant, 31 feet each side, you would have a one-inch play. You can determine it without a circle in that way. Q. One inch each 35 feet? A. The half of the string would be the middle quadrant, that would be 31 feet. Q. A one-degree curve is a very slight degree curve or a great degree curve?

A. It is a very slight degree from a straight line, a very slight deflection from a straight line, is a one-degree curve.

I reached the wreck I should say 35 or maybe forty minutes after it occurred. Mr. Lempke was there and Mr. Rupp, and I think Mr. Bush got there about the same time, assistant superintendent. I went over that track on that day about—well, I would strike there about five thirty that night, on a work train. That evening before the wreck. We rode a work train from Western Avenue, to take the night shift, the watchman and trainmen and engineers, all out to the big yards, and my home is on the same line, and I always ride that train home. I rode that train home that night, and rode on the hind end of the caboose, on the platform.

Q. That is your work, is it, in going over the

(Deposition of Michael Burke.)

tracks? A. Always ride the hind end, yes, sir. Our train went out on track designated as number 1, northbound. That is this track in question. Q. And what is the fact as to your observing the track as you rode on out there? A. Perfect condition.

Mr. WILLIAMS.—I move to strike that as not responsive. [52]

(No ruling.)

Mr. LEE.—Q. Well, did you observe the track as you rode? A. Yes, sir. The track was in good condition. I did not notice anything unusual or out of the way with reference to this portion of the track that evening. Had there been any such defect as the witnesses have described it would not have been possible for our train to have gone over the track in safety. Had there been any such defect I would certainly have been able to observe it. But I saw nothing of the kind. The track is laid with one hundred pound A R A type of rail, which is about as heavy as any rail used in Chicago.

Q. Calling your attention to this rail here in court, did you notice what rail that is? A. That is one hundred pound A R A. That is the rail in question, yes, sir. It has been laying on the right of way, not over one hundred feet from where the accident occurred, ever since the accident. I have seen it there every day. This is not the entire rail, but is ten feet cut off of it. I cut that off a week ago last Monday, before I left Chicago, for the purpose of bringing it here. We have eighteen red

(Deposition of Michael Burke.)

oak treated ties, some prepared red oak treated, and white oak to the standard thirty-three foot rail. We treat the red oak ties to get more lasting life out of them. Zinc treatment, sometimes creosote; treatment to keep insects away from them, make them last longer. This portion of the track had been retied the spring before. We always go over that track every year and take out the bad ties and renew them with good ones; don't have to tak them all out. That had been done, I should say, about September before the wreck. This was in September. We would close our work up usually about September or October, we would finish it before the frost gets in the ground. Each tie has got four spikes in it; that is, two in each rail and they are driven angularly, the two inside spikes are opposite each other and the two outside spikes are opposite each other, and every tie is spiked with four spikes. We use five and a half by nine-sixteenths spikes, [53] Billmuths-Porter spikes, five and a half by nine-sixteenths inches. That is a standard spike. The rail is joined at the end with what we call an angle-bar with four bolts, two in each rail. The angle-bar is about twenty-four inches long, that would lap over twelve inches on each rail. The holes in the end of the rail are for inch bolts to put bolts and nuts through the angle-bar and through the rail. Q. I call your attention to a piece of iron that I have in my hand; I will ask you what that is, Mr. Burke. A. That is part of an angle-bar that was broken, that was found be-

(Deposition of Michael Burke.)

ween the rails. Q. That is part of an angle-bar, is it, that was united with the ends of these rails? A. Yes, angle-bar known as the type called one hundred per cent. That is the type of angle-bar that it is. One hundred per cent means the name of the nature or type of angle-bar. The trade name.

Q. Now, I notice a slot here on the side, the side of the lower part of the rail. What is the purpose of that? A. That is where the tie goes under the joint and that is a slot spike to keep the rail from running with the traffic. If I had the other angle-bar the slot would be in that, about there. There are four of these slots within an angle-bar, two on the inside angle-bar and two on the outside angle-bar, in each joint, and four holes through the angle-bar and at the end of the two rails.

Q. Now, Mr. Burke, is there anything else that joins the rails at the ends? A. Yes, sir, in this we have got the block signal and the rail— Q. (Interrupting.) What do you mean by the block signal? A. The block signal is operated by electric signals that displays to the engineer pulling the train whether there is any train in the block ahead of him. Q. That is, there is an arm that is upright for one signal and slanting for another and horizontal for another? A. Yes, sir. Q. That is known as a semaphore? A. Yes, sir. Q. And that is operated by electricity upon the wires or the rails, which? A. Why, the rail is to carry the expansion. [54] Always when you lay your rail you have a little expansion in there you know. You do not

(Deposition of Michael Burke.)

never heel tight because the rails in summer expand and in winter contract.

Q. I call your attention to this piece of wire on the righthand side of the rail as you face the jury. Is that a part of the bonding wire that was on the rail? A. Yes, sir. Q. Just explain how that extended around to the other rail. A. That attaches about as far on the receiving rail. That wire should extend about as far there. It is also soldered on this rail first and then soldered on that. Q. Fastened in the same manner in which it is here? A. Yes, sir, exactly. You can pull that wire up, you can pull it out six inches. Q. It is put in loosely around the joint? A. Yes, sir. These three bolts (shown witness, two of them with nuts on) are the inch track bolts we use on the one hundred per cent angle-bar. These are the type of bolts that are used on this type of rail and angle-bar to fasten them together at the joint. To secure the nuts against loosening, we put a nut-lock on them, just like that lock right there. That is a Verona nut-lock. Its purpose is to work against the head of the bolt to keep the nut on. That is a steel spring. You see that that will be flat when you get your nut on. You take that ring and do that and then it is flat. And then as it may spring out, it keeps the head of the bolt tight against the rail. The method of construction which I have described applies to this particular point where the wreck occurred, and all the way from Pacific Junction to Western Junction, that is the type of rail in the main track. When I arrived at the wreck I came

(Deposition of Michael Burke.)

there from the north. As I said, my home is near Pacific Junction, about a half a mile. I came on the wrecker, got down as close as we could to the wreck with the wrecker, got off, and the first of course I passed was the engine. I went over and inquired if there was anybody hurt, or how the engineer and fireman—if they were hurt bad. The engine was in bad shape. After I looked that over they told me they wasn't. I went [55] over across the bridge or viaduct, we call it subway. The viaduct was—or subway as we call them in Chicago, the traffic of the street runs under and the railroad above it, and it is erected on concrete abutments about fourteen clearance below for teams to go under, under the bottom of the structure. Well, we have four tracks over that street. That street is known as Pacific Avenue, tracks one, two, three and four. The whole bottom of the bridge is iron plate, with a girder for the rails, what we call an I-beam for the head that sets in onto a wooden cushion under the rail, with bolts ten inches apart. That wood is V-shaped and nuts on top of them that holds the rails on top of the bridge. The supports for the bridge itself are steel girders four feet high, or such a matter. The steel girders are on the side. There is steel girders between each track and on the outside of each track. Two steel girders for each track, one would be a common one between the tracks, five altogether. At the approach of them they go up an incline until they come to a perfect height. At the approach it is about 17 inches from

(Deposition of Michael Burke.)

the top of the rail. Then it goes up an incline to forty-eight inches from the top of the rail; forty-eight inches at the highest point, and then it slopes off to the other end the same way. The break in the track that has been testified to, was about the third joint south of the end of these steel girders, that would be about 70 or 80 feet.

The engine was lying on its side on the north side of the subway. When I saw the engine I wondered how anyone ever got out of it alive. There was no cab on it at all, no smokestack, no headlight, tipped over on its side. I could tell from the appearance of the engine there and the track where the engine had left the rail, and how it traveled from the point it left the rail to where I found it. The mark was right there on the viaduct. When the engine struck the rail she went off very abruptly outside that rail, that is the east rail or the inner rail on the curve, the east rail of the track, and the side of the girder held her up until she got through [56] to the north end of the bridge and as soon as she got through to the north end of the bridge she naturally took a jump and went over the northwest and laid across the four tracks. We had to take the pilot off of her to open number 4 track before we could run a train out. I remember that quite well. The cars had not been removed when I got there. The sleeper was upon the rails, but the baggage-car was pulled down the bank north of the engine. The tank was gone and then turned bottom side up, the engine tank, on the east side of the track, the inside of the

(Deposition of Michael Burke.)

curve. The first-class day coach stood partly on the engine, and the tourist car behind that with the forward pair of trucks all off the track. The forward trucks of the tourist car were off or away from the rail, I should say, two or three inches. These forward trucks had run upon the ties about eighty or ninety feet, so that they were derailed somewhere before coming to that point. The tourist car as I remember was pretty near right where the opening in the track was. The forward end of the tourist car was just a little bit ahead of the opening in the track. The other car, I think, stood in behind the day coaches. I observed the condition of the receiving rail, with reference to its being spiked to the track. When I got there, after I looked the engine over, I went first to find out, see if I could see what caused the derailment. Hadn't seen anybody, and I met Mr. Lemke, special agent; he got there before I got there, and he called my attention to the track and to the angle-bars, and so I says—well, when he showed me the track where the derailment occurred, I saw the spikes had been removed on the inner rail, on the inner side of the receiving-rail. Well, the rail—we will say now that the engine is facing this way and that rail is facing the engine. This is the way the curve runs, curves in this way. When I got there I found the spikes pulled on this side, right along there. The other rail is right along there. This is our spike in here; this is the usual spike in the rail, but that had been eight or nine [57] ties, which would be half a rail length, pulled all out of there,

(Deposition of Michael Burke.)

holes just fresh, and laying along there. The spikes were laying along there. The spikes on the other side of the rail had not been disturbed. They were still there. I observed the condition of the spikes in the rail immediately south of that. The spikes in that rail had been pulled on the outer side of that rail, that would be the side next to the lake, here for about five or six ties, but I noticed here that there was one spike which could not be drawn, and they couldn't get hold of it with their bar—

Mr. WILLIAMS.—I object to what they could do. State the conditions.

The COURT.—Yes.

Mr. LEE.—Q. The spike, you say, was driven down so the head was imbedded? A. Yes, sir.

Defendant's Exhibit 2 is what we call a crowbar, used for pulling spikes, where the spike is driven up straight, and it is not too far down in, and they shove the bar under the side of the spike and take a fulcrum, pull on it and pull the spikes out. Q. This spike that you say was driven down were there any marks on the tie to indicate whether any attempt had been made to pull the spike? A. Yes, sir, there was marks that the bar had been tried to get around the spike. Q. That you say was the fifth or sixth tie back from the joint? A. The open joint, yes, sir.

That was the outside of the south rail. On the inner side of this rail there were pulled eight or nine spikes, I think. I did not count them exactly. That would be about half the rail, about sixteen feet, sixteen and a half or seventeen feet.

(Deposition of Michael Burke.)

A. Where was the outer side or the base of the rail with reference to the spikes that were still in the ties on the outer side? A. That would be the raised rail, the outer edge of the rail? It was about three to three and a half inches in. The groove or gash that appears in the edge of the rail was there that morning, and it had [58] fresh marks on it. Well, I can say that from my experience I figured that is where the engine, forward trucks of the engine, hit the rail, made that mark. Q. Now, I wish you would place the short end of the rail here and the other rail in the relative positions in which you observed them at that time. A. Well, they would have about that much expansion. The lowest rail would be in about that much. That is the way it looked to me. That is about the way the rail was when the engine struck it.

Mr. WILLIAMS.—I object and move to strike his statement as to where the engine struck it.

The COURT.—Yes, I will sustain the objection to that. That is a conclusion.

Mr. LEE.—Q. That was the position in which you found that at the time you saw it? A. Yes, sir.

Q. The rail upon which the engine appeared is represented by this short piece of rail, is it; was that in its original position on the ties? A. It was in its original position on the ties; that rail had never been removed although five spikes were pulled; it was not removed. Q. The spikes upon the inside of the rails were holding? A. That piece of angle-bar was lying outside of the track at that time, when Mr.

(Deposition of Michael Burke.)

Lemke called my attention to it, right near the rail in that shape. The other part of the angle-bar was lying inside the track when he called my attention to it. The other part I presume was picked up with the scrap, when they cleared up the wreck. I do not know where it is. I was not able to bring that along. That rail was not bent in any way before this derailment. It was bent when I found it just the reverse of what it ought to be for the curve. There is a little bend in it yet.

Mr. WILLIAMS.—Q. Has it been straightened?

A. No.

Mr. LEE.—Q. Nothing done to it? A. No. In fact I had a notion to put it in a sidetrack. It would go all right in a sidetrack, but I let it lay there. This curve or bend that we see in [59] here is exactly the opposite way from the curve in the track. Now, the trucks hit it—the wheel going out, hit it, you know—

Mr. WILLIAMS.—I object to that as a conclusion.

(No ruling.)

Mr. LEE.—Q. Now, assuming, Mr. Burke, that the rails were in the position in which you had placed them and that the engine was running along on these rails, where would the flange of the inside wheel be? A. The flange of the inside wheel would be about an inch and a quarter away from the ball of that rail. The flange of the outside wheel, the wheel would be hugging the outer rail on a curve, would be fitting up snug to the outer rail going around a curve.

(Deposition of Michael Burke.)

When a car or engine is running upon a track, the tendency to go straight ahead brings the flange against the rail. There would be about an inch or an inch and a quarter between the flange and the inner side of the rail. That depends somewhat upon the amount of wear there has been upon the outer rail and wheel. The standard gauge of track is four feet eight and a half inches. This rail was laid in 1912 by my men under my supervision. The standard gauge of a track is fifty-three inches from the inner side of flange to inner side of flange.

If these rails were in that position and the engine coming along here on these rails, the flange would strike the receiving rail about an inch and three-quarters from this side, about the place where that mark appears on the rail. It would be easy to crowd this receiving rail into that position when the spikes on the inside were removed, to crowd it in for that distance of three and a half inches. I will show you how it would be done. I have done it myself lots of times. You take your spike that is not pulled and take your crowbar right there and use that as a fulcrum, and you pull against that, and one man has a good power, and you can shove it right in, spring it right in. That is the way it is done with trackmen. The rail would not remain in that position. It would spring right back unless [60] there was a spike put in there or an old angle-bar put in or something to hold it in position.

(The witness, upon request, placed the angle-bar in such position.)

(Deposition of Michael Burke.)

Q. Any other way it could be done? A. Yes, it could go this way. That is the way it was done.

Mr. WILLIAMS.—I move to strike that "That is the way it was done" as not responsive.

(No ruling.)

That is the way it could be done or is done sometimes when you want to hold the rail in position. Assuming that the sides of the wheel did strike the rail in that manner, making the mark as it appears there, the effect upon the engine would be that it would jump right up after it struck that rail. If it were going 25 or 30 miles an hour the engine would jump up and hit the ground on pretty short notice. The indications are that it looks like she jumped up pretty sudden or it would appear along further ahead. It would have marked the rail for some length. My judgment is that when the wheel hit that and jumped up she got outside of it and crossed the rail and bent it. She got right on the bridge sideways, and was right on the side of the bridge, the side of the bridge caught her and held her up. Yes, sir, I am simply giving my opinion—well, the marks were right on the bridge; the marks were on the iron work of the bridge and that bent on the bridge had to be taken out to repair it, all bent out. As soon as she got out of the side of the bridge she went off in that direction, to the northeast that would be, hugging the outer side of the curve. The rails over there were bent badly, some of them pretty near double. I imagine the engine struck the angle-bar, breaking it. The driver came down upon it.

(Deposition of Michael Burke.)

Defendant's Exhibit 3 is called a track wrench, used for putting in track bolts. Used in this manner. I saw the spikes lying along the side of the track. They were all straight, good [61] spikes. I used them again in ties, what I had to use in ties, repairing the track there, drove them back in the ties. I did not find the bolts, the special agent gave me the bolts. He found them before I got there. He was there ahead of me. These are the bolts he gave me. They have been right in my office, since that time, under my desk. I put them in this box and brought them here myself. These are the identical bolts that the special agent gave me that night, at the scene of the wreck. They are in just the same condition they were at that time. They are a little rusty now, of course, on account of not being used. This nut-lock is not that one. It is the same as we use. As to the outer rail being in its normal position, the outer rail, where the break—where the rail was found open, was all right. We did not have to change that at all. And the gauge, as indicated by the rail upon which the engine was running, and the outer rail, is the standard gauge. In other words, there was no spreading of the rail at that point. When there is a spreading of the rails on a curve the outer rail moves, on account of the pressure being against the outer rail. The inner rail never moves in such a case on a curve of that degree. The inner rail would remain stationary. Not as much strain upon that rail. A track is kept up in first class condition, the inner rail never spreads; it is the outer rail.

(Deposition of Michael Burke.)

Q. What section crews or extra gangs or other trackmen were working upon this section of the track at that time? A. Well, I have one foreman there at Pacific Junction. Mr. Hyer, and he has a crew under him of about three men at that time of year. We don't work very many men. Our track is in good condition. As to other men working on this portion of the track, there was a special agent there, special policeman. There were no other track workers who would have anything to do with the condition of the track. There would be none of the railway employees engaged upon that section of the track between five o'clock and the time of the wreck.

[62]

Q. Did you on that evening or the next day observe any other place in that vicinity where the track had been tampered with?

Mr. WILLIAMS.—I object to that and move to strike the words "tampered with."

(No ruling.)

Mr. LEE.—Q. Well, where it was out of condition then, if you object to that term. I don't think there is any question whether this was tampered with or not.

Mr. WILLIAMS.—I object to that. I do not think he has a right to make an argument here.

The COURT.—He may answer the question.

A. Why, yes. If I may answer that question, why, my attention was called by the special agent—

Mr. WILLIAMS.—You are asked to tell about what you saw.

(Deposition of Michael Burke.)

The COURT.—State what you observed.

A. I found another place where there was two bolts taken out of a rail further south on the same track. Q. How far from that? A. One block. Q. You speak about blocks in this testimony. How far is a block in Chicago? A. Well, I should say this block would be one thousand feet, one thousand feet east of where this accident occurred. Q. Then, it was about one thousand feet from Potomac Avenue and that other point you refer to? A. To Division Street. These viaducts are on every block, and that is the way we go by; every block has a viaduct, where a street goes under the tracks. I observed there near Division Street, there was two bolts out of one joint, there on the same side of the rail—track. No spikes were pulled from the ties, or anything of that kind; that is near where the wrench was found. I was not there when the wrench and crowbar were found. I didn't see it until they brought it up. I don't know anything about the matter personally.

Q. Was it necessary, Mr. Burke, to relay any of the ties at this point? Were they in bad condition so that they had to be [63] relaid? A. The ties, after the engine got through the bridge and started to go off her side, they were pretty badly cut up there. There were no rotten ties or ties in bad condition. We put in a few ties south of the bridge, not many. None under these particular rails. We simply took another rail and laid it down there and spiked it on the same ties. From my observation there was no defect in the track at the point of derailment, or any-

(Deposition of Michael Burke.)

thing to indicate that there was any defect which might have caused the wreck, other than this condition of the rail which I have testified concerning, that is, this opening of the rails. The bond wires were not broken. If the bond wires had been broken, it would have resulted in putting the signal system at danger. If these wires had been in any manner broken the signal one thousand feet south would have shown danger as the engine came up. They were not broken at the time I examined them. If this break in these rails, that I have described, had been made in consequence of the wreck, or by the force of the derailment, in any way, the condition of the bolts, spikes, ties, the rails, and so on, they would have all broken off, if it was made on account of that. It would not have been possible for the bolts to have been in the condition in which these bolts are, or the rail to have been in the condition that it is in.

On cross-examination by Mr. Williams, the witness, Mr. Burke, testified as follows:

Yes, sir, I have had quite an experience with wrecks, where trains have left the track, and where there was a general piling up of the train, and where I have attempted *afterwards what* was the cause of them. No, sir, on our line it is not quite a frequent occurrence, for wrecks of that sort. I have seen many of them, yes, sir. I have seen them on our line. As to my always being able to tell just what caused the wreck, well, they can come pretty close to it generally. You see, it ain't left to one man. I can tell about as much as any other man of my experience.

(Deposition of Michael Burke.)

Yes, sir, [64] sometimes experts on that differ considerably. I have always—I have only known one that they didn't find the cause in my forty-six years' railroading, that they didn't find the cause that satisfied me. Whenever a train leaves the track, where it is travelling at a speed of 25 or 30 miles an hour, it piles them up pretty generally, and changes existing conditions very much.

Q. Pretty hard to tell from the condition that you find after the wreck just what they were before the wreck? A. Oh, not if you are familiar with the tracks, if you know what kind of a condition the track was before the wreck. I knew pretty near each individual tie and rail along that track, I can tell you; that is my business. It is not my business to walk the track daily, no, sir. I simply am over it occasionally and examine it as I go along. Well, it is different in my territory than on the main line road you know. Terminal work, there isn't much other way to get to your men only work with or ride on the hand-car with them. In terminal work I figure it is necessary to give it a higher degree of care than other points. No, the place of the wreck was further than three miles from the Union Station. It was three miles from the Union Station to Western Avenue, and this was about a mile and a half north. Our time-card says west, but is north, north of Western Avenue. That would be about four to four and a half miles from the Union Station, still in the City of Chicago. Well, it isn't awfully thickly settled right at the place where that derailment occurred.

(Deposition of Michael Burke.)

There is quite a piece of prairie there, three or four blocks that have been held for building factories on. There are not houses around on both sides, at this particular place; there is further on, a block or so. Farther on there are not business buildings; principally residences, factories. Yes, there are street lights along there, light on each side of that subway, under that four-track subway, five lights on each side and a big arc light at the entrance. When I am speaking of the subway, I do not refer to Pacific Avenue, [65] but to Potomac Avenue. On Potomac Avenue, on each side of that avenue, there are many lights on the viaduct, down in the bottom, where the traffic goes through. No light above. No arc lights off to the side anywhere along there; only the signal light down south of there. That is the only light. Well, yes, there are street lights up and down through that section, a couple of blocks there are street lights; pretty well lighted along there.

Q. So even at night, without any headlight, you could see fairly well? A. Well, you can see; yes, sir. An engineer could see his signals, if he was watching them, without headlights. We have got all electric headlights. Well, as I remember it, when I was called, the night was pretty—kind of raw—little bit of snow falling, kind of a raw stormy night. Just a little snow and rain mixed, kind of sleety. No, no snow on the ground; just about the time I got there kind of sleety rain, but no snow on the ground. When I got there I found the wreck. I think the engine left the track about 82 feet, 75 or 82 feet, along

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there south of Potomac Avenue. With reference to Potomac Avenue, the engine was lying, she went clear through Potomac Avenue Bridge—there is about ninety feet of that, and then as soon as she got through to the north side of the bridge she vaulted off on her side to the northwest, the opposite to where the opening was in the rail, the outer side of the curve. The head of the engine, as it lay when I came there, I should judge was north of Potomac Avenue in the neighborhood of ninety feet, itself, about. I should judge about 150 or 120 feet, 150—about 150 feet. The entire distance to the head of the engine when I got there, from the point where I think it left the rail, would be a distance of about 320 feet; something at least over one hundred yards. No, according to my idea, the engine all of that entire distance had not been plowing through the earth or through the rails or anything that was in the way there; it was riding the rails on the side, the other side of the track, that is on the bridge, on the iron of the bridge. [66]

Q. Well, until it reached the bridge it had to run over the substances that composed the roadbed, wouldn't it? A. The substance composing the roadbed is an iron bottom bridge. Before it reached Potomac Avenue it ran over the ties and gravel, plowing through that way.

The next car to the engine was the baggage-car. It crossed over Potomac Avenue. After the baggage-car got over to the engine it went down to the east side of the track. The marks were on the bridge where it run over the bridge, that is, where the bag-

(Deposition of Michael Burke.)

gage-car went over the bridge. It would be pretty hard to distinguish between the marks made by the baggage-car and the engine. Certainly the tender and the engine and the baggage-car went through the bridge, the three of them. The next car was the first-class coach, day coach. It was standing on the bridge off of Potomac Avenue. The next coach was a first-class coach. It was partly on the bridge and partly off. The next, I believe, was the tourist sleeper, the front trucks of which were just off the rail. The tender was down the embankment about 150 feet north of the bridge, on the east side of the track and ahead of the baggage-car. I suppose it crossed the bridge on the rails and ties; they all got through the bridge some way or other. All told, there left the tracks the engine, the tender, the baggage-car and two day coaches, and the front end of the tourist car. Assuming that this mark on this rail—that is the rail, and that this scar was made by this accident, I do not know that the thing that made this scar went off at an angle of 90 degrees. I don't know what degree it went off at, but I know it struck the side of the bridge and pulled the side of the bridge out and carried it through the bridge, went off pretty straight. I don't think it went off at 45 degrees. The marks don't show it going off that way. Q. Look at the mark on that, Mr. Burke; doesn't that mark show it struck at an angle of about 45 degrees? A. The engine would naturally jump up when she would hit that mark. I don't know what degree that is. [67]

That is a pretty short angle, but I don't think the

(Deposition of Michael Burke.)

mark shows it was at an angle of 45 degrees, though. I would say that angle is, oh, about twenty degrees.

Q. That is assuming that the engine was running in that direction, then when it made that mark the engine turned in an angle of about that, did it not?

A. The engine was not running in that direction. Q. How could it make the mark, then, in that position, unless it was hit? A. The engine was running in this direction before it was hit, diagonally, following the inner rail. The mark as the impression is made on this rail, is not over twenty degrees. I presume it would be the first wheel on the engine that struck it, the pony trucks. Well, no, the weight on the pony trucks is not particularly heavy; they are adjustable. I guess the engineer could tell more about that than I could. I don't know much about such matters. The engineer is here. As to the trucks swinging around in this kind of a way, in any event, I think they have a little lateral motion in them; I wouldn't be sure about that. I don't know how much lateral motion they have. It is not a part of my duties to understand that. Yes, I know something about machinery. I don't know anything about running an engine, or keeping it up. I can't say whether it has a motion so that as the forward end of the boiler or engine is lifted up you can swing the trucks clear around; I don't know anything about that. But I do know, from the appearance of that rail that when that truck, if it was caused by the truck striking it, it threw it off on at least an angle of 20 degrees. Q. And you know, also, as a question of mathematics,

(Deposition of Michael Burke.)

that that would throw the forward part of the engine going about the same direction, wouldn't it? A. Didn't do it. Q. I am speaking, you know, as an expert, Mr. Burke. A. The engine certainly did not go over the bridge. As to the law of moving bodies, under conditions of this kind, I suppose if the sides of the bridge wasn't there she would have gone down to the street. That is what saved it. The sides of the [68] bridge certainly did stop that engine. I can't lay it to anything else. I don't know the approximate weight of the engine. The construction of the bridge is thick iron, riveted. The front of the engine had about 85 feet to go before it reached the side of the bridge. The rail I am referring to is the rail nearest the lake on track number 1. If the front of the engine was thrown at an angle such as I have described, of 20 degrees, I don't know whether it would reach the bridge. She did, though. I am not an expert. I don't claim to be an expert, I am a trackman. The grade is about ten feet outside of the rail, outside of the east rail. If the engine had gone a distance of ten feet to the east it would have gone over the embankment. There is not a thing at that embankment to keep the engine from going over, and in going that ten feet, if it was coming off the east side, it had 70 or 80 feet in which to take up that space of ten feet before it reached the bridge.

The fact is that the ground was not torn up badly. The frost had not gone out of the ground at that time of the year in Chicago. Even with the frost in the ground a heavy object like that did not tear up the

(Deposition of Michael Burke.)

ground much. Yes, I could tell where the wheels had gone. I could trace the wheels right on to the bridge. The wheels of the engine, immediately following the time when it touched the track, followed up here. The marks is there to-day. The line of the locomotive as it continued up to Potomac Avenue was on the ties, and the ties are only 16 inches outside the base of the rail. The marks of the engine didn't—it did not continue on a straight line until it got across Potomac Avenue. It was outside the rail and went down to that, against the east side of the bridge. It bent the whole first section of the bridge; that had to be taken out afterwards. According to the marks I found, it turned off from the east rail before it reached Potomac Avenue about 12 inches. Outside of a variation of about 12 inches, it continued on a straight line until it struck the bridge. Assuming that the forward trucks of the [69] engine might have struck here as I indicated, I do not know where the drivers struck. I don't know anything about that. I did not find any indication of that; nothing of the sort. I did not attempt to find it. That night I investigated everything I could investigate, found just as I have stated, found the track pulled, found the angle-bar here, and the rail broken. I reached there about 35 minutes after the accident. There were not many people around there when I was; no passengers around there. I didn't see any passengers, only trainmen. I wasn't looking for them. I would see them if they were there. They were not around where I was. They were around where the

(Deposition of Michael Burke.)

wreck was, yes, sir. I did not see some of them about the point where the tourist car had left the track. I did not see anyone there. The tourist car left the track pretty close to where the break was in the rail. I think that is where it left. I think that is where they all left. I couldn't tell, no, sir. The front trucks of the tourist car were a little ahead of the break in the track. I did not examine them particularly. I did not examine them to see if there was any break in the flanges of the wheels. Yes, I looked the engine over, as I came down, the first thing, to see if there was any break in the flanges of the wheels. I can't tell exactly how long it took me to examine the engine. It was examined in a way. The upper side was all I could see. The lower part was buried in the gravel. The part opposite was sticking in the gravel. It did that, notwithstanding the frozen ground. The engine was lying on her side. I examined the wheels, yes, sir. I don't know, to tell you the truth, how long I was examining them. Five or ten minutes. I went straight to the point where this rail was. I passed the engine first before I went ahead. That is the only investigation I ever made of that wreck, yes, sir. I looked at the tender; I didn't examine it much until we were going to put it on the track. It was clear down the slope, the bottom of the slope. I examined it about half an hour or an hour after the wreck. [70] I did not examine the baggage-car. I never examined the first passenger coach or the second passenger coach, or the wheels of any of those coaches.

(Deposition of Michael Burke.)

The COURT.—Ask him if he examined any part of the train and it will probably save time. If you expect to get through to-night, gentlemen, you will have to move on a little faster.

Mr. WILLIAMS.—Q. Well, was there any other examination than this after about five minutes that you gave the engine when you came there? A. Never made any more than I stated. When I went back to the point where the tourist car had gone off the rail, I made no more examination of the rail at that point than I made the first time. Just the first examination. I said there were some spikes out. I don't know how they were taken out. I never saw them taken out. With reference to that crowbar that I have been asked about, that, I think, is a Milwaukee crowbar. I do not know who put it out in the hole. I don't know anything about that. I don't know how the wrench and crowbar got under the viaduct. They were found by Mr. Hasbaugh. I don't know where they came from. The wrenches and crowbar have got our brand on them. That is the way we brand them, C. M. & St. P. I don't know who put them where they were found. I do not know that they had any connection with this wreck at all.

(The witness again showed where the angle-bar was.)

The angle-bar was in about that way, to hold the rail open, about in like this. No, it was not pushed inside, it was laid there, evidently had been broken off. The rails were pressing against it. The rails as they now lay here were about the situation at the

(Deposition of Michael Burke.)

time when I went to the wreck. This angle-bar lying in there, the way I have now placed it, there is about an inch on each side of play. I wouldn't say it was just that way. I just gave an explanation of how the angle-bar was found. I stated that it was my opinion that this angle-bar was broken by the train striking it. I don't say [71] that it was in that position when the train struck it. I don't know how the angle-bar came to get there. I simply found it there, my attention was called to it.

Q. You know that, occupying the position you have now placed it in, it cannot be broken by a train. A. No. Q. If that angle-bar had anything to do with keeping these rails apart when the train struck it, if it did strike it at that time, you know the angle-bar was not broked by the train, don't you? A. If it would be in just that position it would not, but the angle-bar was probably about there.

Q. Now, with reference to the bend in the rail, Mr. Burke, you know it is a fact, do you not, that the pressure—if a train—the wheels, the weight of going on top of this rail or on the other side of it, there would be a pressure there so as to bend that rail in the condition you found it? A. If the wheel got on the outside of that rail? Q. Yes, sir, it would do that? A. Yes, sir. Q. And it is also a fact, is it not, that if eight spikes were drawn from a rail of that size, 33 feet long, that one man alone can bend that rail but very little back at this end? A. I can shove it in three inches myself. With nine spikes out I can shove it in three inches. Have a fulcrum only back

(Deposition of Michael Burke.)

16 feet, and a rail of that size. I can hold it there while somebody else puts an angle-bar there, yes. One man can do it. I don't know that one man can do that other, but I can hold it while another man places the angle-bar in there. I cannot give in inches, on a distance of 100 yards in a straight line, how much a degree would be. That is as near as I can give it the way I told you. I can draw out a one degree or find a one degree. When I went out over this track at 5:30 on the work train, the train was running all the time at about 15 or 20 miles an hour. I didn't need to stop to make any examination; I can see the main track. I can see if a spike is out, yes, sir. These two bolts to which I have referred, which were a block or two from the scene of [72] the wreck, were not out at that time. No bolt out between Western Avenue and Pacific Junction. If there had been a bolt out at that place, I would have known it. I would have seen it from the train. From the point where this rail was, that I have referred to as having a mark on it, the rails were pretty badly bent across the subway, all across the subway. Some of them were bent to the south of Pacific Avenue, not bad. One of the rails south of Pacific Avenue, was bent, south of the bridge, the first one. We used several of the rails again, straightened them out. If the engine was running on the outside of this rail here it would have no tendency to pull the spikes. It would have a tendency to pull them in, but the spikes would be still in the ties. These spikes go five inches in the tie; five and a half. I saw this

(Deposition of Michael Burke.)

other piece of broken angle-bar; saw it fit in with this one. It made the complete angle-bar. I didn't say it was the angle-bar that had at one time connected these rails. I can't be sure of that now. There was no other angle-bar there. These angle-bars are not easily broken. A man or track crew or somebody could not take a sledge and easily break it. You can't break that with a sledge. It is an uncommon thing to see bolts or spikes laying along the track in that territory. Take it in the yards, you might find a spike occasionally, but not on the main track. As to this being practically within the yards, in the yard limits, main line yard track, Chicago, I should say it was about one thousand feet there, that particular block, about one thousand feet. I should judge the distance between Pacific Junction and Potomac Avenue at about a half mile. The distance between Potomac Avenue and Kedzie Avenue, pretty near a half a mile, too; from the wreck to Kedzie Avenue, about a mile from where the wreck occurred.

On redirect examination by Mr. Lee, Mr. Burke testified as follows:

Q. Mr. Burke, Mr. Williams asked you with reference to the [73] crowbar which I had not showed you. I think you said this is a Milwaukee tool. What is the fact as to that? A. No, I don't think it is a Milwaukee tool. I think it is—

Mr. LEE.—Perhaps you spoke inadvertently. You refer to the crowbar?

Mr. WILLIAMS.—Yes, I did refer to the crowbar, but I didn't intend to.

(Deposition of Michael Burke.)

Mr. LEE.—Now, Mr. Burke, the engine is not a perfectly rigid piece of machinery, is it? A. I don't think so. I don't think it is, and especially her pony trucks. Q. In your judgment, if the mark here was made by the strike of the trucks, the flanges of the trucks, and the engine was derailed at that point, and in that manner, would that mark be perfectly in harmony with the tracks as you found of the engine as it pushed itself or ran along further on?

Mr. WILLIAMS.—I object to that.

The COURT.—I don't think the witness' judgment on that is any better than the judgment of the jury. I will sustain the objection. (Defendant excepted and exception allowed.)

[**Testimony of Mott Sawyer, for Defendant.]**

Mott Sawyer, called as a witness on behalf of the defendant, being first duly sworn, on direct examination by Mr. Lee, testified:

My name is Mott Sawyer. I am superintendent of the Milwaukee on this division. I am a civil engineer, but not a qualified civil engineer, however. I know something about it. To an engineer a one degree curve is a radius of five thousand eight hundred and some odd feet. It is a curve that in a distance of 31 feet gets one inch off a straight line. In other words, a section of that curve three hundred feet long would vary ten inches from a perfectly straight line. It is a curve, I may say, if it is proper to add, a very slight curve. We use them very much sharper than that, generally. [74]

[Testimony of William A. Lempke, for Defendant.]

William A. Lempke, called as a witness in behalf of the defendant, being first duly sworn, testified on direct examination by Mr. Lee, as follows:

My name is William A. Lempke. I live at 4546 North Long Avenue, Chicago, Illinois. I am 38 years old. My business is special agent of the Chicago, Milwaukee & St. Paul Railway. My duties consist of police work in investigating robbery claims, personal injuries. On March 21st, 1914, I was working around what is known as the Chicago Terminals. On the last part of that day, about five or five twenty I arrived at Pacific Junction. We called up Pacific Junction to see if there was anything new for us, started walking down south towards Western Avenue. That was about 5:30; arriving at Western Avenue about 6 or 6:15. I passed this portion of the track in question; I do every night. As far as I could see there was nothing wrong with the track when I went by. I generally walk on this number 1 and 2 main tracks, at this point, crossing Pacific Avenue. I can't say whether I walked this particular track at that night. I do not have any distinct recollection of that night. I did not observe anything out of the way, at all, at that time. I later visited the scene of the wreck. I arrived about ten or fifteen minutes after the wreck. I lived only about a mile—at that time I lived at 2147 Weston Street, which is about a mile from where the wreck was. None of the witnesses who testified in this case reached the scene of the wreck before I

(Deposition of William A. Lempke.)

got there. I was the first man there.. I observed the condition that existed there at that time. The two rear sleepers or cars were upon the rails. The rear trucks of the tourist sleeper were upon the rails, and the front trucks off. The front trucks at about the point indicated in the track here. I looked at the condition of this rail joint in question that night, yes, sir. The first thing I did when I got there; I started in at the day coach, the first two day coaches, and went through the whole train, asking each and every person— [75]

The COURT.—That is not material in this trial. I examined the break in this rail about fifteen or twenty minutes after I got there. Nothing had been done in the way of removing cars, or doing anything to straighten up the wreck at that time. One rail was shoved in, and I found one piece of the angle-bar lying on the side of the outer rail on No. 1, the east rail and the other part on the outside, as Mr. Burke described it. I think he was there with me at that time. Upon this receiving-rail there were some spikes pulled and the bolts taken out, because I found them at the foot of the embankment. At the foot of the embankment I found the spikes and one of the angle-bars I found there that was not broken. That was to the east side of the track, down in the weeds. Mr. Hasenbalg was with me. I found them down there. Down at the foot of the embankment where I found the spikes. Directly opposite that joint of the rail. I should judge about 30 feet away, that is, figuring the distance level, from the end of the out-

(Deposition of William A. Lempke.)

side rail to where it slips down to the bottom. The nuts were off the bolts; they have been put on the bolts since. I brought them up and laid them down on the top, alongside the track there and brought them over to Mr. Burke. These, so far as I know, are the identical bolts.

Mr. LEE.—I offer these bolts in evidence.

Mr. WILLIAMS.—I don't think they are identified, but I have no objection.

(The bolts admitted in evidence, and marked Defendant's Exhibit No. 4.)

Subsequently I found a small track wrench and crowbar, about daybreak the next morning, about 200 feet from the foot of the elevation, out in the prairie, in the woods. I came back to the track. That is that crowbar right there, and a small monkey-wrench. The crowbar is Defendant's Exhibit 5. I found that in the prairies opposite this point. That is the monkey-wrench. They were away from the break in the track about 200 feet, from the foot of the [76] embankment, that is, where the fence runs along the embankment. I did not find the crowbar and track wrench; Mr. Hasenbalg found them, but I took and removed them from the place where they had been found.

Mr. WILLIAMS.—I move to strike that.

The COURT.—Yes.

Mr. LEE.—Q. Where were they when you first saw them. Up on the abutment of the Division Street viaduct, northeast corner. Mr. Hasenbalg was not with me, I was alone then. I went there after I had

(Deposition of William A. Lempke.)

been told. I received these from the abutment of the Division Street Bridge. That was about one thousand feet from the place of the accident. It is a very long block right in there.

(The Defendant's Exhibits 2 and 3 were offered and admitted.)

Mr. WILLIAMS.—I object as incompetent, irrelevant and immaterial, and not connected with any evidence in connection with this accident.

The COURT.—That is for the jury to say.

(Defendant's Exhibits 2 and 3 admitted.)

On cross-examination by Mr. Williams, the witness, Mr. Lempke, testified as follows:

I lived about a mile from the scene of the accident. Not an easy walk. I came by Chicago Avenue street-car track; my home is within a block of it. I went down within about two or three minutes. I was dressed at the time I received the notice; I had not got to bed yet. I had just about got in that night. It must have been about 10:35 or so, when I received the notice, or 10:40. Anyway, the first thing I did was to interview the passengers. Not until after I had done that did I look at the wreck, or what had happened, or anything. I went through all of these day coaches, the tourist coach and all of them to see the passengers. That took me, I should judge, about fifteen or twenty minutes. I think I could do it in fifteen or twenty minutes. Then I went out and saw something of the accident itself. Well, there was—I can't say there was [77] lots of passengers, but I can't just exactly say how many people there were;

(Deposition of William A. Lempke.)

there was some. With reference to this broken angle-bar I do not know how it got there. I do not know who may have handled it before I got there. I have no knowledge whether or not it might have been put there by somebody; I can't say. These bolts were not on the elevated portion at all, but were lying at the foot of the embankment, where I found them. And the angle-bar I saw down there.

Q. And have you any means of knowing whether these bolts came out of this particular rail or not?

A. That is the bolts that I picked up and handed to Mr. Burke.

Q. I understand, but you don't know anything about connecting them with this particular rail?

A. I can't say.

Q. And the same way as to this wrench that you found on the viaduct, that is about a thousand feet as I understand you, away from the place of the accident?

A. Laying up on some of the shelving underneath, that is the wrench and crowbar, yes. I have no knowledge how they got there. It showed up on the subway and fresh scratches on the concrete, it showed up very plainly. Somebody had been up there recently, yes, sir. That is the crowbar that was in the subway with the track wrench. These two things, whatever they were, if they had been at the scene of this wreck, had been carried by these parties from that distance of about one thousand feet, if they had been used there, yes, sir. No. sir, this crowbar is not used for the purpose of drawing spikes. I have seen trackmen use them though to line up tracks with. I can't say whether if parties were wanting to remove a rail, and had this

(Deposition of William A. Lempke.)

drawbar and the wrench, whether there would be any occasion for the crowbar. I am not an expert in track work. The crowbar was lying east from the scene of the wreck, about 200 feet from the foot of the embankment, that is where I found it. The viaduct where I found the wrench was Division Street. That is south of where the wreck occurred. That is the point where I found two bolts missing out of the joint. This is where the clerk happened to find the crowbar, over there, and crowbar [78] and track wrench down there. These other wrenches that I have referred to, I found them with the crowbar, over at that place in the alley.

Mr. LEE.—I offer the rail in evidence.

Mr. WILLIAMS.—To which we object as immaterial.

Mr. LEE.—The rail and angle-bar also.

(Rail and angle-bar admitted in evidence and marked Defendant's Exhibits Nos. 6 and 7.)

[**Testimony of Peter Haddock, for Defendant.]**

PETER HADDOCK, called as a witness on behalf of the defendant, being first duly sworn, on direct examination by Mr. Lee testified as follows:

My full name is Peter Haddock. I live at 3071 Haskell Avenue, Milwaukee, Wisconsin. I am a locomotive engineer for the Chicago, Milwaukee & St. Paul Railway. I have been a locomotive engineer for about seventeen years, and have worked for the defendant for 25 years. Preceding my time as engineer I was fireman for about eight years. I am the engineer who was in charge of this engine on the

(Deposition of Peter Haddock.)

night of the wreck. I took my engine at the Western Avenue roundhouse. I ran my engine down to the Union Depot, the engine was coupled to the train at the depot. I took the engine about 8:30; that night I inspected the engine all over. I inspected the wheels, everything. The engine, as far as I could observe, was in perfect condition. I left the Union Station with the train at 10:15, left on regular time. I did not make any stops between the Union Station and the point of the wreck. The witnesses who testified as to a stop as Western Avenue are mistaken. We reached the point where the train was derailed about 10:30, about fifteen minutes out. Up to the time of the wreck I had not observed anything unusual or irregular in the operation of the engine or the train. She was running all right, everything was all right. I was running about 35 miles an hour. There is no rate of speed; we have no speed rate at all; that is [79] about the regular rate of speed made in my run over that point, be just about the time card. Our regular course was being pursued that night.

Q. What is the fact as to 35 miles an hour being a moderate or excessive rate of speed over such tracks as this? A. No, that track is good for sixty or seventy or eighty miles an hour. Just as fast as you want to go. The headlight was burning. As to what I am doing on this portion of the track; how my attention is taken up as a rule, driving along there, well, just at the station where the wreck occurred, I was looking at the signal at Pacific Junction. Look-

(Deposition of Peter Haddock.)

ing for the semaphore. I had passed a mile and a half by that at Western Avenue. I was looking for the signal at Pacific Junction. I don't think it is possible, driving at thirty miles an hour for an engineer, at that point, as we were driving, to observe the condition of the track so as to see a separation in the rails such as has been described here. The light from the headlight would be upon the outside rail of a curve of one degree, so the inside rail would be a little in the shadow. It is not an engineer's duty to watch the rail, anyway.

Mr. WILLIAMS.—I object as calling for a conclusion.

The fact as to that is, it is the engineer's duty to practically watch everything, everything he can. You can't have one eye here and the other on a signal half a mile away; pretty hard work. You can't very well watch for signals at the same time you are watching the rails.

Q. Just tell the jury what you experienced that night; what was the first thing you observed, or what was the subsequent action of the engine at the time of the derailment, how did you first observe there was anything wrong? A. The first thing I knew I was on the ground. Q. Did you observe any jolt or jar before that? A. Not a thing; just as though I had been right off the end of the rail. Q. What do you mean to say; you mean you were on the ground or the [80] engine was on the ground? A. The engine was on the ground or on the ties. Q. Just tell the jury how you observed it; just how it seemed to

(Deposition of Peter Haddock.)

you as you remember it. A. I was going along, as I say, about 35 miles an hour, and as you take this curve the railroad runs along this way, and I was looking for the signal half a mile away, and as I was looking for the signal of course the first thing I knew I was running over the ties; the engine was bumping on the ties the first I knew about it. Q. You did not examine the train? A. No, didn't examine nothing. I was hurt too bad.

(The rest of Mr. Haddock's direct testimony omitted.)

On cross-examination by Mr. Williams, Mr. Haddock testified as follows:

My conductor was Charley Elliott. As regards whose duty it was to inspect the engine, they had got regular inspectors when the engine goes in, who inspect them going in. I inspect them going out. That inspection is made by going over the engine and inspecting every nut and every bolt, examining the wheels. I generally test the wheels by hitting them with a hammer. The usual rate of speed in that section is about thirty-five miles an hour. Twenty-five miles an hour is not the limit. They have got to go faster than that or they can't make time. I was not looking at the track ahead of me. As regards my looking at the track at all after we passed Western Avenue, I was surely looking in front of us all the time going along. I don't remember how far back I was when I looked at the track the last time. I don't remember anything about that. The track was pretty near smooth, I can tell you, because I did not

(Deposition of Peter Haddock.)

see any defect in the track. You can't see an open switch going 35 miles an hour, not until within ten feet of it, or twenty. You can't see the switch point. You can see the light, but you can't see the switch point. I was not looking at this particular point of the track, no. I have never had any experience where I came up [81] and hit in any condition like that, where they are separated. I do not know how it would look. I set the brakes, yes, sir, the emergency brakes, as soon as the engine struck the ties; as soon as I felt the jar, wheels striking the ties.

(Witness excused.)

Mr. LEE.—The defendant rests.

Mr. WILLIAMS.—That is the plaintiff's case.

Whereupon a short recess was taken.

[Motion for Verdict in Favor of Defendant, etc.]

Mr. LEE.—If the court pleases, at this time, the defendant challenges the sufficiency of the evidence to support any verdict and moves the court to direct a verdict in favor of the defendant on the grounds that there is no evidence of negligence whatever in the case. I would like to be heard upon this unless Your Honor is perfectly familiar with the rule.

The COURT.—I think I am familiar with the rule. My impression is the credibility of the defendant's witnesses is for the jury. If their testimony is true, of course, there is no right of action here.

(Argument.)

The COURT.—I will deny the motion.

(Defendant excepted and exception allowed.)

Whereupon the case was argued by Mr. Williams

on behalf of the plaintiff, thereafter by Mr. Lee on behalf of the defendant, and the final argument was made by Mr. Williams on behalf of the plaintiff.

WHEREUPON the Court instructed the jury.

[**List of Exhibits.**]

Defendant's Exhibit 1—

Defendant's Exhibit 2—Crowbar.

Defendant's Exhibit 3—Track wrench.

Defendant's Exhibit 4—Bolts.

Defendant's Exhibit 5—Crowbar.

Defendant's Exhibit 6—Rail.

Defendant's Exhibit 7—Angle-bar. [82]

[**Certificate to Bill of Exceptions.**]

State of Washington,

County of Spokane,—ss.

Frank H. Rudkin, Judge of the District Court of the United States for the Eastern District of Washington, Northern Division, and the Judge who presided in said court in the trial of the foregoing cause of Sarah J. Irving vs. Chicago, Milwaukee & St. Paul Railway Company, a corporation, do hereby certify that the matters and proceedings set out in the foregoing Bill of Exceptions, consisting of —— pages, are matters and proceedings occurring in this cause not already a part of the record therein and that said Bill of Exceptions was filed within the time allowed by law and within the time allowed by order of the Court extending such time and the same are hereby made a part of such record.

I further certify that such amendments as were proposed thereto by the plaintiff have been agreed to

by the defendants, and the same are hereby made a part of such record.

I further certify that the said Bill of Exceptions contains all of the matters and facts material in the proceedings heretofore occurring in the cause and not already a part of the record therein and that the same contains all of the facts material in the proceedings as the parties have agreed to the matters therein and that at the time of the signing of this Bill of Exceptions counsel for the respective parties appeared and consented to the signing thereof without notice or application therefor by either party.

Dated this 30th day of August, A. D. 1915.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Bill of Exceptions. Due service of within Bill of Exceptions is hereby admitted this 27th day of August, A. D. 1915. (Signed) Danson, Williams & Danson, Attorneys for Plaintiff. Received and filed in the U. S. District Court for the Eastern District of Washington, August 30, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [83]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

No. 2062.

SARAH J. IRVING,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-WAY COMPANY, a Corporation,

Defendant.

Petition for Writ of Error.

To the Honorable FRANK H. RUDKIN, Judge of the District Court, aforesaid:

Now comes Chicago, Milwaukee & St. Paul Rail-way Company, defendant above named, by its attorneys, and respectfully shows on the 28th day of April, 1915, the jury duly impaneled found a verdict against your petitioner, and in favor of Sarah J. Irving, plaintiff, for \$1500.00, and upon said verdict a final judgment was entered on the 22d day of June, 1915, against your petitioner, the defendant herein.

Your petitioner, feeling itself aggrieved by said verdict and judgment entered thereon as aforesaid, herewith petitions the Court for an order allowing it to prosecute a Writ of Error to the Circuit Court of Appeals of the United States, in and for the Ninth Judicial Circuit, under the laws of the United States in such cases made and provided.

WHEREFORE, the premises considered, your petitioner prays that a Writ of Error do issue, that

an appeal in this behalf to the United States Circuit Court of Appeals, aforesaid, sitting at San Francisco, in said Circuit, for the correction of the errors complained of and herewith assigned, be allowed, and that an order be made fixing the amount of security to be given by plaintiff in error, conditioned as the law directs, and upon giving such bond as may be required, [84] that all further proceedings may be suspended until the determination of said Writ of Error by the Circuit Court of Appeals, and that a transcript of the record, proceedings and papers in said cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

(Signed) GEO. W. KORTE,
CULLEN, LEE & MATTHEWS,
Attorneys for Petitioner in Error.

[Endorsements]: Petition for Writ of Error. Due service of this Petition for Writ of Error admitted this 16th day of September, 1915. (Signed) Danson, Williams & Danson, Attorneys for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington, September 20, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [85]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

No. 2062.

SARAH J. IRVING,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation,

Defendant.

Assignment of Errors.

Now comes defendant, Chicago, Milwaukee & St. Paul Railway Company, a corporation, plaintiff in error, and makes and files this, its Assignment of Errors.

I.

The above-entitled Court erred in denying defendant's motion for a directed verdict in favor of the defendant, at the close of all of the evidence in the case, for the reason that the evidence was insufficient to support any verdict, and that there was no evidence of negligence of the defendant whatsoever.

II.

The trial Court erred in instructing the jury as follows:

"In other words, gentlemen of the jury, taking into consideration all of the testimony introduced before you, and presumptions of fact to which I have referred, if you can say that you are satisfied from a preponderance of the testimony here,

that the defendant company was negligent, plaintiff is entitled to recover, but if the jury is not satisfied of that fact by the preponderance of the testimony, your verdict must be for the defendant."

III.

The Court erred in entering judgment upon the verdict in favor of plaintiff and against the defendant, for the reason that the evidence is insufficient to support the verdict, and that there is no evidence at all of negligence of the defendant.

(Signed) GEO. W. KORTE,
CULLEN, LEE & MATTHEWS,
Attorneys for Defendant. [86]

[Endorsements]: Assignment of Errors. Due service of the within Assignment of Errors admitted this 16th day of September, 1915. (Signed) Danson, Williams & Danson, Attorneys for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington, September 20th, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [87]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 2062.

SARAH J. IRVING,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation,

Defendant.

Order Allowing Writ of Error.

On this 20th day of September, A. D. 1915, comes now the defendant, the Chicago, Milwaukee & St. Paul Railway Company, by its attorneys, Geo. W. Korte and Cullen, Lee & Matthews, and having filed herein, and presented to the Court, its petition praying for the allowance of a Writ of Error to the United States Circuit Court of Appeals, in and for the Ninth Judicial Circuit for the United States, accompanied with Assignment of Errors intended to be used by said Railway Company, and praying also that a transcript of the record and proceedings, and papers upon which the verdict and judgment herein were rendered, duly authenticated, may be sent to the said United States Circuit Court of Appeals, and also for an order fixing the amount of security to be given by the plaintiff in error, and that upon giving such bond as may be required, that all further proceedings may be suspended until the determination of said Writ of Error by the said United States Circuit Court of Appeals.

In consideration whereof, the Court does allow said Writ of Error, and directs that a transcript of the record, proceedings and papers upon which the verdict and judgment herein were rendered, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that plaintiff in error give bond, according to law, in the sum of two thousand dollars (\$2,000.00), which shall operate as a supersedeas bond.

(Signed) FRANK H. RUDKIN,
Judge. [88]

[Endorsements]: Order Allowing Writ of Error.
Due service of the within Order Allowing Writ of
Error admitted this 16th day of September, 1915.
(Signed) Danson, Williams & Danson, Attorneys for
Plaintiff. Filed in the U. S. District Court for the
Eastern District of Washington, September 20. 1915.
W. H. Hare, Clerk. By S. M. Russell, Deputy. [89]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 2062.

SARAH J. IRVING,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation,
Defendant.

Writ of Error [Copy].

United States of America,—ss.

The President of the United States, Woodrow Wilson, to the Honorable Judge of the District Court of the United States for the Eastern District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the District Court before you, between Sarah J. Irving, plaintiff, and Chicago, Milwaukee & St. Paul Railway Company, a corporation, defendant, a mani-

fest error has happened to the damage of the said Chicago, Milwaukee & St. Paul Railway Company, defendant, as by said complaint appears, and it being fit that the error, if any there has been, should be corrected and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Judicial Circuit, together with this Writ, so that you have the same at the City of San Francisco, California, where the said court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held. And the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein, to correct the error, what of right and according to the laws and customs of the United States, should be done. That upon giving a [90] Supersedeas Bond, as required by law, all further proceedings may be suspended until the determination of this Writ of Error.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 20th day of September, 1915.

Allowed this 20th day of September, 1915.

By (Signed) FRANK H. RUDKIN,
United States Judge.

[Seal] Attest: (Signed) W. H. HARE,
Clerk of the United States District Court for the
Eastern District of Washington, Northern Division.

[Endorsements]: Writ of Error. Service of within Writ of Error admitted this 16th day of September, A. D. 1915. (Signed) Danson, Williams & Danson, Attorneys for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington, September 20, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [91]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2062.

SARAH J. IRVING,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation,
Defendant.

Stipulation as to Supersedeas Bond.

It is hereby stipulated by and between the respective parties, that a Supersedeas Bond may be filed in the above-entitled case, in the sum of Two Thousand Dollars (\$2,000.00).

Dated this 16th day of September, A. D. 1915.

(Signed) DANSON, WILLIAMS & DANSON,
Attorneys for Plaintiff.

GEO. W. KORTE,
CULLEN, LEE & MATTHEWS,
Attorneys for Defendant.

[Endorsements]: Stipulation. Filed in the U. S. District Court for the Eastern District of Washing-

ton, September 20, 1915. W. H. Hare, Clerk. By
S. M. Russell, Deputy. [92]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 2062.

SARAH J. IRVING,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation,
Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, Chicago, Milwaukee & St. Paul Railway Company, a corporation, as principal, and National Surety Company, a corporation, as surety, are held and firmly bound unto Sarah J. Irving, defendant in error, in the full and just sum of two thousand dollars (\$2,000.00), to be paid to the said Sarah J. Irving, her attorneys, administrators, executors and assigns, to which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Signed and dated this 20th day of September, 1915.

WHEREAS, lately, at a regular term of the District Court of the United States for the Eastern District of Washington, Northern Division, sitting at Spokane, in said district, in a suit pending in said court, between the said Sarah J. Irving as

plaintiff, and said Chicago, Milwaukee & St. Paul Railway Company, as defendant, cause numbered 2062, on the Law Docket of said court, final judgment was rendered against the said Chicago, Milwaukee & St. Paul Railway Company for the sum of fifteen hundred dollars (\$1500.00), with interest thereon from the date of said judgment, to wit, the 22d day of June, 1915, and costs of suit taxed at one and 85/100 dollars, and the said Chicago, Milwaukee & St. Paul Railway Company has obtained a Writ of Error and filed a copy thereof in the clerk's office of the said court to reverse the judgment of the said court [93] in the aforesaid suit, and the Citation directed to the said Sarah J. Irving, defendant in error, citing her to be and appear before the United States Circuit Court of Appeals, for the Ninth Judicial Circuit, to be held at the City of San Francisco, State of California, according to law, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said Chicago, Milwaukee & St. Paul Railway Company shall prosecute its Writ of Error to effect, and answer all damages and costs, including the full amount of said judgment, and interest, if it fails to make its plea good, then this obligation to

be void, else to remain in full force and virtue.

(Signed) CHICAGO, MILWAUKEE & ST.
PAUL RAILWAY CO.

By CULLEN, LEE & MATTHEWS,
Its Attorneys.

(Signed) NATIONAL SURETY COMPANY,
By JAMES A. BROWN,
Res. Vice-president.

[Seal] Attest: E. F. BOOTH,
Res. Asst. Secretary.

Approved this 20th day of September, 1915.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Bond on Writ or Error. Service of within Bond is hereby admitted this — day of September, A. D. 1915. (Signed) Danson, Williams & Danson, Attorneys for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington. September 20th, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [94]

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

SARAH J. IRVING,
Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation,
Defendant.

Citation [Copy].

The President of the United States to the Above-named Plaintiff, and to Danson, Williams & Danson, Your Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Judicial Circuit, to be held in the City of San Francisco, in the State of California, within thirty days from the date of this Writ, pursuant to a Writ of Error filed in the clerk's office of the United States District Court for the Eastern District of Washington, Northern Division, wherein Chicago, Milwaukee & St. Paul Railway Company, a corporation, is plaintiff in error, and you are the defendant in error, to show cause, if any there be, why the judgment in the said Writ of Error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Edward D. White, Justice of the Supreme Court of the United States this 20th day of September, 1915.

(Signed) FRANK H. RUDKIN,
[Seal] Attest: Judge.
(Signed) W. H. HARE,
Clerk.

[Endorsements]: Citation. Due service of the within Citation admitted this 16th Day of September, 1915. (Signed) Danson, Williams & Danson, Attorneys for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington, Sep-

tember 20, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [95]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2062.

SARAH J. IRVING,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation,
Defendant.

Stipulation as to Exhibits.

It is hereby stipulated by and between the parties hereto that an order of the Court may be entered herein, directing the exhibits in the above-entitled cause, or such of them as either party may designated, be by the clerk of said court, transmitted with the Transcript on Appeal to the United States Circuit Court of Appeals, at San Francisco, California.

Dated this 16th day of September, A. D. 1915.

(Signed) DANSON, WILLIAMS & DANSON,

Attorneys for Plaintiff.

GEO. W. KORTE,

CULLEN, LEE & MATTHEWS,

Attorneys for Defendant.

[Endorsements]: Stipulation. Filed in the U. S. District Court for the Eastern District of Washington, September 20, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [96]

*In the District Court of the United States for the
Eastern District of Washington, Northern Divi-
No. 2062.*

SARAH J. IRVING,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation,
Defendant,

Order to Transmit Exhibits.

Upon stipulation of the parties hereto, which stipulation is filed with the clerk of the above-entitled court,

It is hereby ordered that the exhibits used in the trial of the above-entitled cause in the United States District Court, or such of them as either party may designate, be by the clerk of said court transmitted with the Transcript on Appeal to the United States Circuit Court of Appeals, at San Francisco, California.

Done in open court this 20th day of September, 1915.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Order to Transmit Exhibits. Service of within Order admitted this 16th day of September, 1915. (Signed) Danson, Williams & Danson, Attorneys for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washing-

ton, September 20, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [97]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2062.

SARAH J. IRVING,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation,
Defendant.

Praecept for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare and send to the Clerk of the Circuit Court of Appeals the following records, to wit:

Petition for Removal;

Notice of Hearing Petition for Removal;

Bond on Removal;

Order Removing to Federal Court;

Complaint;

Answer;

Reply;

Verdict of Jury;

Judgment;

Exceptions to Court's Instructions;

Petition for New Trial;

Order Denying Petition for New Trial;

2 Stipulations Extending Time for Filing and
 Signing Bill of Exceptions;
2 Orders Extending Time for Filing and Sign-
 ing Bill of Exceptions;
Bill of Exceptions;
Petition for Writ of Error;
Assignment of Errors;
Order Allowing Writ of Error;
Writ of Error;
Stipulation re Supersedeas Bond;
Bond on Writ of Error;
Citation;
Stipulation to Forward Exhibits;
Order to Transmit Exhibits;
Praeclipe for Transcript of Record.
(Signed) GEO. W. KORTE,
 CULLEN, LEE & MATTHEWS,
 Attorneys for Defendant.

[Endorsements]: Praeclipe for Transcript of Record. Filed in the U. S. District Court for the Eastern District of Washington, September 20, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy.

[Certificate of Clerk U. S. District Court to Transcript of Record, etc.]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2062.

SARAH J. IRVING,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation,

Defendant,

United States of America,

Eastern District of Washington,—ss.

I, W. H. Hare, Clerk of the District Court of the United States in and for the Eastern District of Washington, do hereby certify that the foregoing typewritten pages, are a full, true, correct and complete copy of so much of the record, papers and other proceedings in the foregoing entitled cause, as called for by the defendant and plaintiff in error in its praecipe, as the same remains of record and on file in the office of the clerk of said District Court, and that the same constitute the record on Writ of Error from the judgment of the District Court of the United States in and for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California, which Writ of Error was lodged and filed in my office on September 20th, 1915.

I further certify that I hereto attach and herewith transmit the original Writ of Error and the original Citation issued in this cause.

I further certify that I herewith transmit the original exhibits on file in said action, as follows: Defendant's Exhibit 2, being a crowbar; Defendant's Exhibit 3, being a track wrench; Defendant's Exhibit 4, being bolts; Defendant's Exhibit 5, being a [99] crowbar; Defendant's Exhibit 6, being a rail; Defendant's Exhibit 7, being an angle-bar; which original exhibits I transmit pursuant to order of this Court.

I further certify that the fees of the clerk of this court for preparing and certifying to the foregoing typewritten record amount to the sum of thirty-nine dollars and thirty-five cents (\$39.35), and that the same has been paid in full by the defendant and plaintiff in error, Chicago, Milwaukee & St. Paul Railway Company.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Spokane, in said District, this 29th day of September, 1915.

[Seal]

W. H. HARE,
Clerk. [100]

[Endorsed]: No. 2664. United States Circuit Court of Appeals for the Ninth Circuit. Chicago, Milwaukee & St. Paul Railway Company, a Corporation, Plaintiff in Error, vs. Sarah J. Irving, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the

Eastern District of Washington, Northern Division.
Filed October 2, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 2062.

SARAH J. IRVING,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation,
Defendant,

Writ of Error (Original).

United States of America,—ss.

The President of the United States, Woodrow Wilson, to the Honorable Judge of the District Court of the United States, for the Eastern District of Washington, Northern Division, Greetings:

Because in the record and proceedings, as also in the rendition of the Judgment of a plea, which is in the District Court before you, between Sarah J. Irving, Plaintiff, and Chicago, Milwaukee & St. Paul Railway Company, a Corporation, defendant, a manifest error has happened to the damage of the said Chicago, Milwaukee & St. Paul Railway Com-

pany, defendant, as by said Complaint appears, and it being fit that the error, if any there has been, should be corrected and full and speedy justice be done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Judicial Circuit, together with this Writ, so that you have the same at the City of San Francisco, California, where the said Court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held. And the record and proceedings aforesaid being inspected, the United States *Circuit of Appeals* may cause further to be done therein, to correct the error, what of right and according to the laws and customs of the United States, should be done. That upon giving a Supersedeas Bond, as required by law, all further proceedings may be suspended until the determination of this Writ of Error.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 20 day of September, 1915.

Allowed this 20 day of September, 1915.

By FRANK H. RUDKIN,
United States Judge.

[Seal] By W. H. HARE,
Clerk of the United States District Court, for the
Eastern District of Washington, Northern Division.

[Endorsed]: In the District Court of the United States, Eastern District of Washington, Northern Division. Sarah J. Irving, Plaintiff, vs. Chicago, Milwaukee & St. Paul Railway Company, a Corporation, Defendant. Writ of Error. Service of within Writ of Error admitted this 16th day of Sept., A. D. 1915. Danson, Williams & Danson, Attorneys for Plaintiff. Filed in the U. S. District Court, Eastern District of Washington. Sept. 20, 1915. Wm. H. Hare, Clerk. S. M. Russell, Deputy.

No. 2664. United States Circuit Court of Appeals for the Ninth Circuit. Filed Oct. 2, 1915. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By Meredith Sawyer, Deputy Clerk.

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

SARAH J. IRVING,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation,
Defendant.

Citation (Original—Lodged Copy).

The President of the United States to the Above-named Plaintiff, and to Danson, Williams & Danson, your Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Judicial Circuit, to be held in the

City of San Francisco, in the State of California, within thirty days from the date of this Writ, pursuant to a Writ of Error filed in the clerk's office of the United States District Court, for the Eastern District of Washington, Northern Division, wherein Chicago, Milwaukee & St. Paul Railway Company, a corporation, is the plaintiff in error, and you are the defendant in error, to show cause, if any there be, why the judgment in the said Writ of Error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable EDWARD D. WHITE, Justice of the Supreme Court of the United States, this 20 day of September, 1915.

(Signed) FRANK H. RUDKIN,
Judge.

[Seal] Attest: W. H. HARE,
Clerk.

By _____,
Deputy.

[Endorsed]: No. 2062. In the United States Circuit Court of Appeals for the Ninth District. Sarah J. Irving, Plaintiff, vs. Chicago, Milwaukee & St. Paul Railway Company, a Corporation, Defendant. Citation. Due service of the within Citation admitted this 16th day of September, 1915. Danson, Williams & Danson, Attorneys for Plaintiff. Filed in U. S. District Court, Eastern District of Washington. Sep. 20, 1915. Wm. H. Hare, Clerk. S. M. Russell, Deputy.

No. 2664. United States Circuit Court of Appeals
for the Ninth Circuit. Filed Oct. 2, 1915. Frank
D. Monckton, Clerk U. S. Circuit Court of Appeals
for the Ninth Circuit. By Meredith Sawyer, Deputy
Clerk.

United States Circuit Court of Appeals
For the Ninth Circuit.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation,

Plaintiff in Error.

vs.

SARAH J. IRVING,

Defendant in Error,

BRIEF OF APPELLANT.

Upon Appeal from the United States District Court
for the Eastern District of Washington,
Northern Division.

Filed

JAN 22 1916

F. D. Monckton,
Clerk.

GEO. W. KORTE,
CULLEN, LEE & MATTHEWS,
Attorneys for Appellant.



United States Circuit Court of Appeals

For the Ninth Circuit.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation,

Plaintiff in Error.

vs.

SARAH J. IRVING,

Defendant in Error,

BRIEF OF APPELLANT.

*Upon Appeal from the United States District Court
for the Eastern District of Washington,
Northern Division.*

GEO. W. KORTE,
CULLEN, LEE & MATTHEWS,
Attorneys for Appellant.

STATEMENT OF FACTS.
(References are to printed record.)

This is an action for damages for personal injury. Appellee, Defendant in Error, was a passenger upon one of the regular passenger trains operated by appellant, Plaintiff in Error, between Chicago and Seattle, and as the train was leaving the City of Chicago, and while running between Western Avenue and Pacific Junction, in said city, the engine and forward portion of the train were derailed. The tourist sleeper, in which Appellee was riding, was partly derailed, but remained upright on the rails and road-bed, the engine and cars forward of the tourist being thrown upon their sides and wrecked. Appellee was in the dressing room at the time, and was thrown against the door. The fact of the injury, which fortunately is not very serious, is not disputed. The jury fixed the amount of damages at \$1500.00.

The Railway Company answers, and, we think proves, that it was in no way responsible for the derailment of its train, but that the same was caused by the removal of spikes and angle bars and the displacement of a rail at the point of derailment, and that same was the work of trespassing vandals, who thus designed the wrecking of the train.

The train left the Union Depot at 10:15 P. M., and was derailed about twelve minutes later. (p. 56). Between five o'clock that evening and the time of the accident, or in five hours and fifteen minutes, twenty-

three trains, sixteen of which, including this one, were passenger trains; two were work trains and four were freight trains, passed over this track. (pp. 55-56). The last train over the track was the fast mail, which preceded this train by twenty minutes, leaving the Union Depot at 9:55 P. M. (p. 55). Three passenger trains had preceded this one within fifty minutes. (p. 55). Nothing unusual is noted until the happening of the accident. The track is elevated upon an earth embankment between streets, and upon steel bridges over the streets. The railroad is, however, accessible from the streets. (p. 37). There are four parallel tracks, all being constructed upon a slight curve. There were no section crews or other track men of the Railway Company working upon any portion of the track in question after five-thirty o'clock P. M., on the day in question. (pp. 40 & 75). During the day of the accident, and until 5:30 o'clock P. M., a section crew, consisting of Foreman Hegger, who testified as a witness, (pp. 31 to 43), and three other men were engaged in inspecting and working upon the section of track from Western Avenue to Pacific Junction, a distance of about one and one-half miles. (p. 31 & p. 75, Hegger here appearing by mistake in printing as "Heyer"). Hegger had inspected this track on the day of the accident and found all rails properly spiked, there being spikes on each side of the rail, with four spikes to the tie. (pp. 33 and 63). All angle irons were firmly bolted to the rails, and the track in proper condition in all respects. (pp. 33, 41 and 63). The road was in all particulars of

standard construction. There is no evidence of any defect existing for more than a few minutes, at best, prior to the accident.

The engine was of standard type and quality, and by inspection made just before leaving the Union Depot, was found in perfect condition. (p. 97). The train operated at its usual and proper speed, gave no evidence of anything unusual or wrong until the engine suddenly left the rails and turned upon its side. (pp. 97-98).

After the accident the conditions found to exist are described by several witnesses, none of whom are impeached or in any way discredited, and these conditions seem to clearly prove that the cause of the derailment was the intentional displacement of a portion of a rail, and that this was the act of some vandal intent upon wrecking the train. The bolts which held the angle bars firmly upon the rails and thus held the ends of two rails together and in line, were removed and were found near the spot, with every indication that the lock nuts used in holding them in place had been removed by the use of a track wrench. (pp. 45, 46, 54, 74, 92, 93 and 95). The bolts and nuts are in evidence as Exhibit No. 4. They show no evidence of having been removed by other means than the ordinary use of a wrench. A wrench such as is used for the purpose was found near the scene. (pp. 45 and 93). Exhibit No. 3. The spikes for a distance of half a rail length, about sixteen feet, or eight or nine ties, two spikes to the tie, on the inner side of the rail had

been pulled out and were found alongside of the rail. The spikes were uninjured, and had every appearance of having been pulled with a claw-bar, the instrument ordinarily used for that purpose. (pp. 45, 68, 54, 58, 74 and 86). A claw-bar was found near by. (p. 45) Exhibit No. 3. The spikes on the other or outer side of the next rail south had been pulled out for a distance of five or six ties, in an evident attempt to displace that rail also, but one spike was encountered that had been so deeply driven that the claw-bar could not be made to pull it, and so the attempt here was evidently abandoned. (p. 69).

One of the angle bars was broken, and one piece (Exhibit No. 7), was found between the ends of the rails, it having apparently been placed there to hold the displaced rail in its position. (pp. 50, 54, 70, 71, 84, 86, 87, 92).

The rail was pushed inward about one-half the width of the ball or top of the rail, about one and one-half inches, and being held there by the angle bar, was in position to receive the flange of the wheels of the engine. A dent in the end of the rail shows that the flange did strike the end of the rail. (Exhibit No. 6) (pp. 45, 50, 54, 86, 87). A crow bar (Exhibit No. 5), and a small wrench were also found in the weeds near the place the next morning.

The bond wires, used to carry the electric current that operates the block signals, and which are soldered onto the rails at each joint, were not broken or removed. Had this been done the block signals would

have been automatically set against the train and the train would have been stopped before entering the block. (pp. 59, 64, 65, 77).

There is no evidence of any other cause of the derailment than that furnished by these facts, and in the opinion of expert railroad men, the derailment was caused by the misplaced rail, the flange of the engine wheel striking the end of the rail and causing the engine to be immediately derailed. (pp. 45, 54, 70, 71, 72, 73).

SPECIFICATIONS OF ERROR.

I.

The trial Court erred in denying appellant's motion for a directed verdict in favor of the appellant, at the close of all of the evidence in the case, for the reason that the evidence was insufficient to support any verdict, and that there was no evidence of negligence of the appellant whatsoever.

II.

The trial Court erred in instructing the jury as follows:

“In other words, gentlemen of the jury, taking into consideration all of the testimony introduced before you, and presumptions of fact to which I have referred, if you can say that you are satisfied from a preponderance of the testimony here, that the defendant company was negligent, plaintiff is entitled to recover, but if the jury is not satisfied of that fact by a preponderance of the testimony, your verdict must be for the defendant.”

III.

The Court erred in entering judgment upon the verdict in favor of appellee and against the appellant, for the reason that the evidence is insufficient to support the verdict, and that there is no evidence at all of negligence of the appellant.

IV.

The Court erred in denying the motion made by appellant for a new trial.

ARGUMENT AND AUTHORITIES.

Appellant contends that there is no evidence in the record sustaining the verdict of the jury, that it was the duty of the trial Court to have directed a verdict for the defendant.

We are well aware that this is a case wherein the doctrine of *res ipsa loquitur* applies; but the presumption which arises from the mere fact of the accident resulting in personal injury, is not evidence; it is but a rule of law fixing the order of proof. The plaintiff in such case is said to have the legal right, because of this rule of law, to compel the defendant to assume the burden of explaining the cause of the accident. The burden of proof does not shift from the plaintiff to the defendant, but the duty of going forward in producing evidence material to the case is placed, in the first instance, upon the defendant. The appellee, plaintiff below, offered no proof of negligence of defendant, whatever, but relied solely

upon the bare presumption. This was sufficient to compel the defendant to proceed to account for and explain the cause of the derailment of the train. The defendant did, we contend, establish, not only by a preponderance of the evidence, but beyond any reasonable doubt, that the derailment was caused by some unknown vandal, and that it was not caused by any agency under the control of defendant; that no reasonable degree of care or diligence could have prevented the accident. Not a scintilla of evidence was offered even tending to disprove any item of appellant's evidence as to the physical facts found to exist immediately after the derailment of the train. These facts must stand as admitted, and being admitted, there is no other conclusion reasonably possible than the one contended for by the appellant.

These facts are, that the railway track in question was of standard construction; that it was inspected during the day of the derailment and found to be in proper condition; that it was used safely by many trains immediately before the time of the derailment; that the engine and cars of the derailed train were inspected a few minutes before leaving the Union Depot on this trip, and found to be in proper condition; that the train was properly operated; and that nothing indicating any defect in the train or in the track was observed before the moment of the derailment. These facts thoroughly disprove the presumption upon which the plaintiff relies.

But the appellant went further and established by

undisputed evidence further facts as follows:—Immediately following the wrecking of the train there was found to exist ample evidence of the fact that a rail had been displaced by being loosened from the ties, and one end of the rail pushed inward about one and one-half inches; that this was accomplished by pulling the spikes that held the rail in place, and by removing the angle bars which joined the ends of two rails; that the person or persons who did this dastardly deed, used the ordinary tools and methods designed for the purpose, such tools being found near the place, and the spikes, bolts and anglebars being also found, all in such condition as to indicate no other fact than that all had been removed by human agency, using the usual tools and methods in removing them; that such condition of the track did not exist twenty minutes earlier, as at that time the fast mail train passed safely over the track.

Had the appellant been able to have produced witnesses to testify that they saw one or more men upon the track within the twenty minutes which elapsed between the passing of the fast mail train and the coming of this train, and to have further testified to having seen the end of the receiving rail pushed in and held in place by the angle-bar inserted between the ends of the rails, that they saw the spikes being pulled and the angle-bars being removed, and that they had heard the vandals say that care must be exercised to avoid breaking the electric circuit, consisting of rails and bonding wires, as to do so would set the signals against the train, and thwart their diabol-

ical scheme, the facts as to what caused the derailment would not, in our judgment, be more completely established. There would then be further evidence of the means of creating the conditions, and evidence of the facts having been seen to exist before the accident, but not more positive evidence that the facts did exist at the time of the accident, and that the appellant was in no way responsible for either the existence of the conditions or for not having discovered their existence.

Had witnesses testified to having seen and heard all we have indicated above, can it be said that there was any question of fact for the jury? Certainly there was not. How, then, can it be said that there was any question of fact for the jury under the facts shown by the record? There is nothing upon the one hand but the bare presumption, while upon the other hand there are facts which fully account for all that happened. To say that the Court is justified in submitting the case to the jury is to say that no state of facts shown by the defendant is legally sufficient to overcome the presumption. In other words, that the bare presumption, unsupported by evidence of any kind, is *evidence* and that the Court may not say as a matter of law that the plaintiff has not sustained the burden of proof necessary to support a judgment in favor of the plaintiff; that every case involving the doctrine of *res ipsa loquitur* must be submitted to the jury, and if the jury for any reason sufficient unto itself, sees fit to disregard the positive and undisputed evidence as to the cause of the accident, and having

thus disregarded the proven facts, find a verdict based upon a presumption, which is designed only to support the rule as to the production of evidence, the Court is powerless to prevent the miscarriage of justice thus effected.

This cannot be the correct rule and no amount of dicta, contained in opinions of courts passing upon the usual complicated facts of cases involving the doctrine of *res ipsa loquitur*, can, we believe, be construed into authority for such decision in this case.

The office of such presumption as the one here involved has been the subject of much consideration. Judge Chadwick, of the Washington Supreme Court, says, speaking for that Court, in a recently decided case:

“Presumptions are indulged when certain proof is wanting; they are never allowed to displace facts.

“‘Presumption,’ as happily stated by a scholarly counselor *ore tenus*, in another case, ‘may be looked on as the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts.’ That presumptions have no place in the presence of actual facts disclosed to the jury, or where plaintiff should have known the facts had he exercised ordinary care, is held in many cases, of which samples are, *Reno v. Railroad*, 180 Mo. l. c. 483; *Nixon v. Railroad*, 141 Mo., l. c. 439; *Bragg v. Railroad*, 192 Mo. 331. To give place to presumptions on the facts of this case, is but to play with shadows and reject substance.” “*Paul v. United Rys. Co.*, 152 Mo. App., 577, 134 S. W. 3.”

Beeman v. Puget Sound Traction L. & P. Co., 79 Wash., 137.

And again, in an earlier case:

“A presumption of fact is not evidence, but a rule of law fixing the order of proof. When proof is offered to rebut the presumption, the burden shifts, and it is incumbent upon the opposing party to sustain his case by competent evidence. Scarpelli v. Washington Water Power Co., 63 Wash., 18, 114 Pac., 870; Elliott, Evidence, Sec. 91, 92, 93; Wigmore, Evidence, Sec. 2491; Peters v. Lohr, 24 S. D. 605, 124 N. W. 853.”

Nicholson v. Neary, 77 Wash., 295-298.

And again, Judge Chadwick, in further discussion of the subject, and in a case decided December 8, 1915, says:

“A great deal has been said about the burden of proof, but a primary rule in all cases is that the one who has the affirmative of an issue must sustain it by competent proof. If that burden is sustained, either by fact or presumption of law, it is incumbent upon the defendant to balance the weight of evidence. If he does there can be no recovery, for the plaintiff has not sustained his case by a preponderance of the evidence. There is a difference between what we call a preponderance of the evidence and the burden of proof. The one is the weight of evidence, the other is a rule of practice fixing the order of proof.

“Mr. Thayer, in his comprehensive work, *A Preliminary Treatise on Evidence at the Common Law*, finds the expression of Lord Justice Bowen, in *Abrath v. North-Eastern R. Co.*, 32 W. R. 53, to be a clear statement of the true rule. It follows:

“‘In order to make my opinion clear, I should like to say shortly how I understand the term ‘burden of proof.’ In every lawsuit somebody must go on with it; the plaintiff is the first to begin, and if he does nothing he fails. If he makes a *prima facie* case, and

nothing is done by the other side to answer it, the defendant fails. The test, therefore, as to burden of proof is simply to consider which party would be successful if no evidence at all was given, or if no more evidence was given than is given at this particular point of the case, because it is obvious that during the controversy in the litigation, there are points at which the *onus* of proof shifts, and at which the tribunal must say, if the case is stopped there, that it must be decided in a particular way. Such being the test, it is not a burden which rests forever on the person on whom it is first cast, but as soon as he, in his turn, finds evidence which, *prima facie*, rebuts the evidence against which he is contending, the burden shifts until again there is evidence which satisfies the demand. Now, that being so, the question as to *onus* of proof is only a rule for deciding on whom the obligation rests of going further, if he wishes to win.'

"See, also, 2 Chamberlayne, Modern Law of Evidence, Sec. 936.

"This rule is adopted, but is not credited as a quotation, by Jones in his work on evidence."

Welch v. Creech, 46 Wash. Dec., 243.

The Nebraska Supreme Court, in a street railway case, says:

"Negligence is the gist of the action, and the plaintiff holds the affirmative, which he must establish by a preponderance of the evidence. Proof of the accident is not direct proof of negligence. The accident is a mere collateral fact, but one so commonly associated with lack of due care that, when proved, it raises a strong probability, amounting to presumption, of negligence. But when proof of such accident is met by proof of other facts and circumstances, making it equally probable that it was the result of causes wholly beyond the control of the defendant, and which no human skill and foresight could have

guarded against or prevented, one probability offsets the other, and the affirmative of the issue, in the absence of other evidence tending to establish it, stands, just as it stood at the beginning of the controversy, not proved. As was said by Commissioner Ames, in Rupp v. Sarpy County (Neb.), 98 N. W., 1042: ‘The burden of sustaining the affirmative of an issue involved in an action does not shift during the progress of the trial, but is upon the party alleging the facts constituting the issue, and remains there until the end.’”

Omaha Street R. Co. v. Boesen, 105 N. W. Rep.,
303, 4 L. R. A. (N. S.), p. 122.

See also note to this case.

The circumstances of some cases are such that the Court may properly submit the cause to the jury under proper instructions. Upon the other hand, the facts may be such that there is no controversy in the evidence, and in such case the Court must direct a verdict.

“‘Cases may arise in which plaintiff’s *prima facie* case is so fully explained and controverted as to leave no substantial conflict in the testimony.’ In such cases it is the duty of the Court to take the case away from the jury, either upon a challenge to the sufficiency of the testimony, or on a motion for a judgment notwithstanding the verdict.”* * * “The appellants having shown no cause for the falling of the wire, the only evidence before the Court as to the cause was that given by the defendant. So that upon the charge of negligence there was at the close of the case, no controversy in the evidence; and the question thereupon became one of law for the Court, and not one of fact for the jury. Had appellants in any manner controverted this evidence, by a showing that it did not

occur as contended by respondent, or, occurring, did not cause the Arthur street wire to fall from its post as shown by respondent, then there would have been left a determinable question of fact for the jury; but until there was some issue made as to this evidence there was nothing to submit to the jury."

Scarpelli v. Washington W. P. Co., 63 Wash., 19 (Supra).

The above was a case involving the doctrine of *res ipsa loquitur*, and the appellant insisted that the presumption was sufficient to take the case to the jury. The Court disposes of this contention in the language quoted.

Railway fire cases present a like presumption of negligence which sometimes is raised by the terms of a statute, and sometimes by rules established by Courts.

Judge Sanborn, speaking for the Circuit Court of Appeals, of the Eighth Circuit, says of such a presumption:

"This presumption, however, is not a conclusion of law. It is nothing but an artificial, rebuttable presumption of fact whose sole office is to change the burden of proof. When that result has been attained, the presumption becomes *functus officio*. It may not be used after the evidence of the facts has been adduced to raise an issue for the jury which the evidence itself does not present. Hence, in the first instance, it is always a question of fact for the Court at the close of the evidence whether or not the presumption of negligence arising from these statutes has been overcome by the evidence of the care exercised by the defendant. If the proper employes of the railway company have testified to the effect that there were no defects in the locomotive, or that reasonable care had been used to avoid them, and that the engine was op-

erated with ordinary care and skill, and the evidence at the close of the trial is so conclusive that an opposite finding is not sustainable, the statutory presumption has been overcome as a matter of law, and it is the duty of the court to instruct the jury in a fire case from these states, as in other cases, to return a verdict for the railway company. *Rosen v. Chicago G. W. Ry. Co.*, 27 C. C. A. 534, 536, 83 Fed. 300, 302; *Karsen v. Railroad Co.*, 29 Minn., 12, 14, 15, 11 N. W. 122; *Daly v. Railway Co.*, 43 Minn. 319, 45 N. W. 611; *Smith v. Railroad Co.*, 3 N. D., 17, 23, 53 N. W. 173; *McTavish v. Great Northern Ry. Co.* (N. D.) 79 N. W. 443, 446; *Spaulding v. Railroad Co.*, 30 Wis. 110, 123, 11 Am. Rep. 550; *Id.*, 33 Wis. 582; *Huber v. Railway Co.*, 6 Dak. 392; 43 N. W. 819; *Koontz v. Navigation Co.* (Ore.), 23 Pac. 820; *Railroad Co. v. Talbot*, 78 Ky. 621; *Railroad Co. v. Packwood*, 7 Am. & Eng. Ry. Cas. 584; *Louisville & N. R. Co. v. Reese*, 85 Ala. 497, 5 South. 283, 7 Am. St. Rep. 66."

Woodward v. Chicago, M. & St. P. Ry. Co., 145 Fed., 577.

Prior to the filing of the opinion in the Woodward case, Judge Sanborn had filed a strong dissenting opinion in the case of *Great Northern Ry. Co. v. Coats*, 115 Fed. 452, (opinion on page 458), in which he says:

"There was evidence from which the jury might properly infer that the fire was set by sparks or coals from the locomotive. It is a general rule of evidence, which has been adopted by this Court and by the Supreme Court of South Dakota,—the state in which this case was tried,—that the scattering of coals or sparks of fire by a locomotive raises a presumption that there was either a defect in the engine, or negligence in its operation. *Kelsey v. Railroad Co.*, (S. D.), 45 N. W., 204, 207. But this is not a conclusive

presumption of law. It is only a disputable legal or artificial presumption of fact which has been adopted by the courts, *ab inconvenienti*, for the purpose of changing the burden of proof, because it was so difficult for the plaintiffs to establish in the first instance defects in the locomotives, or negligence in the operation of the engines of railway companies. In *Smith v. Railroad Co.*, 3 N. D. 17, 22, 53 N. W. 173, the Supreme Court of the state announced the real reason and the true legal effect of this rule in these words:

“ ‘But to prevent a denial of justice some of the courts have created an artificial presumption of negligence, to the end that the defendant may be compelled to produce the witnesses who are familiar with the facts on which the issue of negligence depends, that they may be subjected to full and searching cross-examination on all the phases of the case,—on all the possible grounds of negligence. Some courts have refused to go so far. To extend this presumption of negligence beyond the reason for its existence would be irrational. It summons defendant to show that there was no negligence, and the evidence must fully meet every possible ground of negligence under the circumstances and the pleadings. But when the whole case, independently of this artificial presumption, shows that there was no negligence, the presumption cannot be considered for the purpose of making an issue for the jury. It has fully served its purpose, and can have no other effect. We therefore establish it as the rule in this case that the Court must, in the first instance, determine the question whether the inference of negligence arising from the mere setting out of a single fire has been fully overthrown.’ ”

“The rule that the scattering of fire raises a presumption of defect in the engine, or negligence in its operation, was subsequently enacted into a statute in the state of North Dakota. Rev. Codes N. D., Sec. 2984. But even when embodied in that imperative form the Supreme Court of that state adhered to its rule. It said:

“ ‘Setting the fire is made presumptive evidence of such defects or negligence. But this Court is fully committed to the principle that whether or not such statutory presumption is overcome by evidence introduced by the defendant is, in the first instance, a question of law for the Court (Smith v. Railroad Co., 3 N. D. 17, 53 N. W. 173), and also to the further position that when the proper employes of the defendant railroad company have gone upon the stand, and testified that there were no defects in the construction or equipment of the engine, and no negligence in its operation, making their testimony at all points as broad as the presumption, then, as *matter of law*, such presumption is overcome. Evidence of that character was introduced by the defendant in this case.’ McTavish v. Railway Co., 79 N. W. 443, 446.

“The same rule prevails in the state of Minnesota, under a similar statute. Thus, while in the Karsen Case, cited in the opinion of the majority, the Supreme Court of Minnesota held that the evidence for the defendant in that particular case had not satisfactorily overcome the presumption, it as clearly declared that it was a question of law for the Court whether or not the evidence had done so, and that whenever it had that effect there was no question left for the jury, and it was the duty of the Court to withdraw the issue from their consideration. That Court said:

“ ‘We do not think or hold that the mere fact that the fire was set by an engine has such an effect as direct evidence of negligence, if the otherwise uncontradicted evidence on the part of the Railroad Company showed satisfactorily that it had fully performed its duty in the premises. And if a jury should so find, it would be the right and duty of the Court to set aside the verdict, as in any other case where it was not justified by the evidence;’ Karsen v. Railway Co., 29 Minn., 14, 15; 11 N. W., 122.

"To the same effect are Spaulding v. Railroad Co., 30 Wis., 110, 123; 11 A. Rep., 550; Id. 33 Wis., 582; Huber v. Railway Co., 6 Dak., 392; 43 N. W., 819; Koontz v. Navigation Co. (Or.), 23 Pac., 820; Railroad Co. v. Talbot, 78 Ky., 621; Railroad Co. v. Rackwood, 7 Am. & Eng. R. Cas., 584; Railroad Co. v. Reese, 85 Ala., 497; 5 South, 283; 7 Am. St. Rep., 66.

"Nor is this rule variant from that which ordinarily obtains when *uncontradicted evidence meets a disputable presumption of fact*. Lawson, in his Law of Presumptive Evidence, at page 661, says:

"'Primarily, the rebuttable legal presumption affects only the burden of proof; but, if that burden is shifted back upon the party from whom it first lifted it, then the presumption is of value only as it has probative force, except it be that on the entire case the evidence is equally balanced, in which event the arbitrary power of the presumption of law would settle the issue in favor of the proponent of the presumption.'

"In Bryant v. Railroad Co., 4 C. C. A., 146; 53 Fed., 997,—an action for negligence resulting in death,—it appeared at the first trial that the deceased was riding on a passenger car of the defendant on its railroad when he was killed, and there was no rebutting testimony. This Court held that the fact that he was riding on the passenger car upon the railroad raised a presumption that he was a passenger, and reversed the Court below because it directed a verdict for the defendant. The same fact was proved at the second trial, and the same presumption arose, but it was then rebutted by uncontradicted evidence that a yardmaster who was without authority to do so was operating the passenger car without the knowledge of the Railroad Company when the deceased was killed. At this second trial the Court below had submitted the case to the jury, and the Railroad Company was met in this Court by the proposition that, since the presumption had once arisen in the case that the deceased was a passenger, it remained and

constituted some evidence for the consideration of the jury, and therefore prohibited the Court from taking the issue from them. But this Court said:

“ ‘A presumption of fact, like that which the counsel for the defendant in error herein invoke, is a mere inference from certain evidence, and, as the evidence, changes, the presumption necessarily varies. A trial Court is not bound to disregard a conclusive presumption which arises from all the evidence at the close of a case because at some time in the course of a trial counter presumptions arose. Possession of real estate raises a presumption of title, but, when a legal title is proved in another, a conclusive presumption arises from all the evidence that the latter is the owner, and the Court must so direct. Possession of a horse raises the presumption of ownership, but the uncontradicted evidence of competent witnesses that the horse is the property of another, and that the possessor secretly took him from his owner without right, raises so conclusive a presumption of ownership in the latter that the Court might be bound to disregard the first presumption from possession, and the possession itself might raise a presumption of larceny.’

“And we reversed the judgment below, and held that it was the duty of the trial Court to take the question whether or not the deceased was a passenger from the jury, notwithstanding the fact that the presumption that he was so arose from the plaintiff’s evidence. Railroad Co. v. Bryant, 13 C. C. A., 249, 256; 65 Fed., 969, 975, 976. The presumption of negligence in the operation of a locomotive which arises from the fact that it scatters sparks or coals or sets a fire is neither more sacred nor more conclusive than the presumption of ownership which arises from the possession of property, or the presumption of the relation of one riding in a car to a carrier which arises from his riding on its railroad in its passenger car, or from any other disputable presumption of fact; and it ought to receive no different measure of consideration.

"The Supreme Court of the state of South Dakota (the state in which the case at bar arose, and in which it was tried) has adopted the rule which prevails in North Dakota, Minnesota, and many other states,—the rule that it is always, in the first instance, a question of law for the Court whether or not the presumption of defects in a locomotive, or of negligence in its operation, arising from the setting of a fire or the scattering of sparks or coals, is overcome by the testimony of due care introduced by the defendant, and that if the uncontradicted evidence of its proper employes is that there were no defects, or that there was no negligence in the operation of the locomotive, and that testimony is as broad as the presumption, the presumption is overcome, as a matter of law, and it is the duty of the Court to withdraw the issue from the jury. Thus in *Kelsey v. Railroad Co.*, 45 N. W., 204, 207, that Court said:

"‘The plaintiff, by proving that the defendant’s locomotive engine had set fire to dry grass or other combustible matter along its roadbed, made a *prima facie* case of negligence; and, had defendant failed to introduce any proof, the plaintiff would have been entitled to a verdict in his favor, under the direction of the Court. But the defendant did introduce its employes who were engaged in running the train at the time, and the master mechanic having charge of the repairs of the engines of the road for that division, who testified that this particular engine was in good order, and had the modern appliances attached to it to prevent the emission of sparks and the dropping of live coals of fire, and that the engine was run with the usual care and caution at the time the fire started. This evidence rebutted the presumption raised by the plaintiff’s proof, and, had there been no other evidence of negligence, the defendant would have been entitled to a verdict from the jury under the direction of the Court.’”

“This rule that the presumption of negligence from the setting of a fire is, as a matter of law, over-

come by the uncontradicted testimony of witnesses that due care was exercised, is a rule of evidence, a rule of practice, a rule which simply measures the force and effect of a disputable presumption of fact in the trial of fire cases in the states of South Dakota, North Dakota, Minnesota, and perhaps in other states; and in those states it ought to and does obtain in the Federal Courts, as well as in the state Courts, because it is a just and rational rule, and because the act of congress provides that the practice, forms, and modes of proceeding in actions at law in the national Courts shall conform, as near as may be, to the practice, forms, and modes of proceeding existing at the time in like causes in the Courts of Record of the state within which the Federal Courts are held. Rev. St., Sec. 914.

"The result is that it was, in the first instance, a question of law for the Court below in this case whether or not the presumption of negligence in the operation of the defendant's locomotive, which arose from the scattering of sparks or coals and the setting of the fire, was overcome by the testimony for the defendant; and if the testimony of its proper employes that there was no negligence in the operation of the engine, was uncontradicted, and was as broad as the presumption, then that presumption was overcome, as a matter of law, and it was the duty of the trial Court to withdraw this charge of negligence from the consideration of the jury on the motion of the defendant."

If the facts themselves do not speak negligence, they cannot be aided by a presumption which is not evidence of a fact. The presumption never goes to the jury as a question of fact. As said in Spaulding vs. Ry. Co., 33 Wisconsin, 582, at page 592:

"The presumption under consideration is clearly one of law. Its weight and effect and the amount and

character of the proof necessary to overcome it, are questions for the Court. * * * The better opinion seems to be that no disputable presumption of law is to be regarded as testimony which must necessarily be submitted to the jury. * * * It is a presumption drawn or indulged by the Court, as distinguished from one which must be drawn by the jury, which furnishes the practical test whether it is a presumption of law or a fact."

In the case of *State v. Hodge*, 50 N. H., 510, the question of whether such a presumption should go to the jury or is for the Court, is learnedly answered according to our contention. The case should be read.

Wigmore, in his work on Evidence, Secs. 2490, 2491 and 2494, defines *prima facie* evidence, or *prima facie case*, to simply mean sufficient evidence or case upon which a party would be entitled to recover if his opponent produced no further testimony.

Elliott on Evidence, Vol. 1, Sec. 91, gives the rule more comprehensively and in a practical way, thus:

"The office or effect of a true presumption is to cast upon the party against whom it works the duty of going forward with evidence. It has the force and effect of a *prima facie* case and, temporarily, at least, relieves the party in whose favor it arises from going forward with the evidence. This would seem to be its sole office and effect, considered merely in its character as a presumption. If nothing further is adduced, it may settle the case in favor of the party for whom it works, and, on the other hand, when the other party has gone forward with his evidence, and the *prima facie* case is overcome, *the force of the presumption is spent.*"

Sec. 92. "The evidential facts upon which the presumption is based, or from which it springs, may take their place with the rest and operate with their own natural force as a part of the entire mass of evidence or probative matter, and thus be put into the scale and weighed with the rest, *but the presumption itself cannot be*. To permit a presumption to be added to the scale when the facts upon which it is based are shown, *would be to give double weight to the same facts.*

In *Gibson vs. International Trust Co.*, 177 Mass., 100; 58 N. E., 278, it is directly ruled in a negligence case, that "the plaintiff seeks to avail himself of the doctrine of *res ipsa loquitur*, but we are of the opinion that that doctrine has no application where all the facts and circumstances appear in evidence."

The case was one where the plaintiff was injured by an elevator starting prematurely by the involuntary act of the elevator boy in attempting to save himself from falling as he attempted to sit down on a movable chair which had been taken away without his knowledge. No other facts were shown by the plaintiff, and it was insisted that the presumption obtaining from *res ipsa loquitur* should be applied and weighed as evidence in the case. The Court ruled as above that the facts of themselves must speak negligence and no weight can be given to the presumption when all the facts are before the Court.

The Wisconsin case of *Menominee Sash Door Co. v. Ry.*, 91 Wis., 447, cited in support of the foregoing text, ably points out when the presumption acts in a

given case and when it is a nullity. And, quoting further from authorities, it is said:

“The presumption, when the opposite party has produced *prima facie* evidence, has spent its force and served its purpose, and the party then in whose favor the presumption operated, must meet his opponent’s *prima facie* evidence *with evidence and not presumptions*. A presumption is not evidence of a fact, but purely a conclusion.”

The most practical and sensible analysis of the proposition that presumptions are not evidence, is made by Hammon on *Presumptions, Burden of Proof and Judicial Admissions*, a work published in the year 1907 in one volume. His elucidation of the subject is so clear, as compared with most text writers, that the one volume work ought to be on the desk of every trial and Appellate Court. His text is always supported by the ablest Courts of the Union. In speaking to the point, he says (p. 47) :

“While presumptions are ordinarily regarded as belonging peculiarly to the law of evidence, they belong in strict propriety to the wider field of legal reasoning in its application to particular subjects. They are ‘aids to reasoning and argumentation and assume the truth of certain matters for the purpose of some given inquiry. They may be grounded on general experience or probability of any kind, or merely on policy and convenience. On whatever basis they rest, they operate in advance of argument or evidence, or irrespective of it, by taking something for granted,—by assuming its existence.’ *In themselves, however, they are not evidence, although for the time being they accomplish the result of evidence. They are simply a process which aids and shortens inquiry and argument.*”

He cites, in support of the statement that presumptions in themselves are not evidence, the following cases:

Sturdevant's Appeal, 71 Conn., 398;
McGinnis v. Kempsey, 27 Mich., 363;
Lisbon v. Lyman, 49 N. H., 553.

Again, the author, Sec. 66f., p. 276, says:

"And it (presumption of negligence) does not arise if, in proving the accident, additional facts appear which exonerate the defendant from blame."

See also:

Dovell v. Guthrie, 99 Mo., 653;
Stearns v. Co., 184 Penn., 519;
Ry. Co. v. Waxelbaum, 111 Ga., 812.

The rule obtains in a variety of cases. It perhaps has been applied and construed more often in negligence cases than in others. However, in the case of bailments the rule has been uniformly applied with as much precision and consistency as in the negligence cases heretofore cited.

The New York Supreme Court, since the case of *Platt vs. Hibbard*, 7 Cowan, 500, and down to the present time of *Stewart v. Stone*, 127 N. Y., 500, has adhered to the rule that presumptions are merely rules of law and can aid nothing where all the facts appear or should appear. In the Platt case it is said:

"The warehouseman, in the absence of bad faith, is only liable for negligence. The plaintiff must, *in all cases* suing him for the loss of goods, allege negli-

gence and prove negligence. The burden is never shifted from him. If he proves the demand upon the warehouseman and his refusal to deliver, *these facts unexplained are treated by the Courts as prima facie evidence of negligence; but, if, either in the course of his proof or that of the defendant, it appears that the goods have been lost by theft, the evidence must show that the loss arose from the negligence of the warehouseman.*"

Where the presumption arising from the fact of the accident is met by evidence making it equally probable that the accident was not due to negligence on the part of the defendant, the latter will be entitled to a verdict in the absence of other evidence tending to establish the affirmative of the issue.

Vol. 5, Ruling Case Law, Sec. 719, p. 85;
Omaha St. Ry. Co. v. Boeson, 74 Neb., 764; 4 L. R. A. (NS.), 122;
Mexican Central Ry. Co. v. Lauricella, 87 Tex., 277; 47 Am. St. Repts., 103, and note.

A very instructive case, and one very similar to this case, is that of *Fredericks v. North Central Ry. Co.*, 157 Pa., 103; 22 L. R. A., 306. In that case, cars left upon a side track with brakes set and the derailing switch open were released and directed onto the main line by boys, and a collision occurred with a train carrying passengers. On the authority of the case of *Deyo v. N. Y. Central Ry. Co.*, 34 N. Y., 9, and other cases, the Pennsylvania Court held that there was no liability.

"The rule of highest skill, care, and prudence does

not require the impossible, or the very extreme of care and precaution that can be imagined. In Shearman & Redfield on Negligence (Sec. 266) it is thus expressed: ‘This doctrine is not to be construed as meaning that the carrier must adopt all the precautions that an ingenious mind could suggest, or have all the skill that science could give, nor that he must use all the precaution which, after an accident has happened, it can be seen would have sufficed to avoid it, nor even that he must use such precautions as one would use who knew beforehand that the accident would otherwise certainly occur.’ Again, at section 270, the writer says: ‘A railroad company is certainly not liable for an injury arising from a break in its tracks, caused by a sudden and extraordinary flood, or by the wilful act of a stranger, unless the injury happens to a train which the servants of the company run upon the broken road after they, or those who ought to advise them, have had notice of its condition, or have had sufficient opportunity to learn it.’ In 2 Wood’s Railway Law, at section 302, the writer, presenting the subject in words nearly identical with the foregoing, continues: ‘The law does not require such particular precaution as, it is apparent after the accident, might have prevented the injury, but such as would be dictated by the utmost care and prudence of a very cautious person before the accident, and without knowledge that it was about to occur. The defendant must use the highest degree of practicable care and diligence that is consistent with the mode of transportation adopted.’ This was the precise language of the Court in the case of *Bowen v. New York Cent. R. Co.*, 18 N. Y., 408; 72 Am. Dec., 529. The rule is stated in substantially the same way in 2 Rorer on Railroads (p. 955), thus: ‘But this rule of greatest possible care is not to be understood as requiring the utmost degree of care which the human mind can attain to or is capable of inventing. Such application of it would involve such an expenditure as would tend to prevent all persons of ordinary prudence from engag-

ing in the business. It simply means greatest degree of care that is consistent with that mode of transportation. It does not contemplate such a measure of care as will render it practically impossible to continue the railroad transportation of passengers. * * * They are by no means insurers of human life, and are not accountable for the results of latent defects which the usual and well-recognized tests of science and art fail to detect; nor are they liable for accidents which skill and experience are unable to foresee and avoid.'

"The very question which arises in this case was decided in *Deyo v. New York Cent. R. Co.*, 34 N. Y., 9. The plaintiff was a passenger on the railroad of the defendant at night. 'The train was thrown from the track through the culpable act of some unknown person, who maliciously or mischievously drew the spikes which fastened the chairs and the rails. Two trains had passed over this section of the road at the point where the injury happened. * * * The road was in good condition when these trains passed over it in safety and without any obstruction.' Davies, J., in delivering the opinion, said: 'The only question upon this appeal is whether there was any evidence of negligence on the part of the defendants or their servants sufficient to warrant the learned justice who tried the action in submitting that question to the jury. It is a familiar principle that carriers of passengers are not insurers of the safety of their passengers. Their duty is measured by the dangers which attend railroad carriage; and the utmost foresight as to possible dangers, and the utmost prudence in guarding against them are required to exempt them from liability in case of injury to a passenger. * * * There was no evidence in this action of any negligence on the part of the defendants, their servants or agents. This portion of the track was laid with the best and most improved rail. It was in perfect order. It had been passed over by their track-master a few hours before the accident. Within two hours before it occurred three trains of cars

had passed over it in safety, and it must then have been in complete order. The proximate cause of the accident was the removal of the spikes which fastened the chairs and rails to the ties and sleepers. It is apparent that, as soon as these fastenings were removed, a superincumbent pressure would displace the rails, and thus inevitably throw the cars off the track. No human care or foresight could guard against such a diabolical act, committed under the circumstances developed in this case. It is clear that these fastenings must have been removed after the last train going east had passed the point where the road was disturbed.' The Court below had on the trial granted a compulsory nonsuit, and the Court of Appeals affirmed the judgment, saying: 'If, therefore, the jury on this testimony had found that the defendant had been guilty of negligence, it would have been the duty of the Court to have set aside the verdict.'

"It will be observed that in the case just cited there was no affirmative proof as to who removed the spikes, and thus caused the rails to become displaced. There was, therefore, a possibility that they might have been removed by some vindictive employe who had been discharged. In fact, there was evidence to prove just such a state of facts, but nevertheless the Court held that the company was not liable. But in the case at bar there was full proof that the cars were uncoupled and the brakes loosened, and the switch turned back, by a person who was a total stranger, and having nothing to do with the defendant company, and for whose acts, therefore, the company was not responsible in any conceivable manner.

"The case of *Curtis v. Rochester & S. R. Co.*, 18 N. Y., 534; 75 Am. Dec., 258, is another instance in which the same doctrine of non-liability was held, although there the evidence was sufficient to warrant a verdict of negligence. The plaintiff was a passenger, and was injured by the car running off the track at a switch at a station, which was misplaced, on the main track. There was no evidence to show how it

become misplaced, and as it was at a station there was sufficient evidence of want of care to carry the case to the jury. But the Court of Appeals, in their comments upon the rule of duty applicable in such cases, said: ‘Carriers of passengers are not insurers, and many injuries may occur to those they transport for which they are not responsible. They are, for obvious reasons, held bound to exert the utmost care and vigilance to secure the safety of passengers, and are responsible for the slightest negligence. But injuries may often happen through the fault or misconduct of those whose acts are in no way chargeable to them. * * * Still accidents may occur from a multitude of causes, even upon a railroad, for which the company is not responsible. If obstructions are placed by strangers upon the road, either through accident or design, the company is not responsible for the consequences, unless its agents have been remiss in not discovering them.’

“That is precisely this case. These cars were in a place of safety, and amply secured against either leaving their position or running on the main track, by a switch, so as to derail them if they did get loose. But they were detached from the other cars, their brakes were opened, and the derailing switch turned back by one who was a stranger; and within a very few minutes after this was done the collision occurred. There was no time for the defendant’s agents to discover the mischief, and they cannot be charged with negligence in that respect. So far as this defendant is concerned, it is of no consequence who it was that committed this crime, nor what his motives were. He was a stranger, over whom they had no control, and they were not responsible for his acts.

“In two of our recent cases the rule of the presumption of negligence from the mere fact that the plaintiff was a passenger, and was injured, has received qualifications which are strictly applicable to the case at bar. The first of them is Pennsylvania R. Co. v. McKinney, 124 Pa., 462; 2 L. R. A., 820, in

which the plaintiff was a passenger on the defendant's train, and while reading a newspaper in his seat at an open window, was struck in the eye by a hard substance, and seriously injured. On the trial the Court below instructed the jury that they should start with the presumption that the defendant was guilty of negligence from the mere happening of the accident, and that it thereupon devolved upon the defendant to rebut that presumption, and show that they were not negligent. We held that this was error, because the accident occurred from something extraneous to the railroad and the appliances of travel, and it would be necessary for the plaintiff to go further, and affirmatively prove that there was negligence. The present chief justice, in delivering the opinion, pointed out the difference between an accident resulting from the mere operation of the road and one which was the result of some extrinsic cause. In the former the presumption of negligence arose, from the mere happening of the accident; in the latter no such presumption arose, and the fact of negligence for which the defendant was responsible must be proved by satisfactory testimony, just as in any ordinary case between strangers. Concluding, he said: 'If the case had been submitted to the jury on the evidence, and they had found therefrom that the plaintiff's injury resulted from something connected with the operation of the railroad, and not from something entirely disconnected therewith, and with which neither the company nor its employes had anything whatever to do, that would have raised *prima facie* a presumption of negligence on the part of the company, and thrown upon it the burden of proving that it did not exist.'

"In the present case, the injury having occurred as the result of a collision of cars on the railroad, the plaintiff was entitled to the benefit of a presumption of negligence, and the Court below so charged the jury. But the defendant met and rebutted that presumption by showing conclusively, and without the least contradiction, that the collision was occasioned

solely by the criminal act of a stranger, with whom neither the company nor its agents had anything to do. As this was an undisputed fact, it is almost impossible to understand why the learned Court below would not have been justified in withdrawing the case from the jury, as was done in the case of Deyo v. New York Cent. R. Co., *supra*, on the ground that upon the whole testimony no negligence was shown for which the defendant was responsible. But the learned Court left that question to the jury, and the jury found that the defendant was not guilty of any negligence which produced the injury, and that verdict, of course, settles the question.

"The appellant claims that the Court below did not dwell with sufficient force and emphasis upon the rule of the highest degree of care, skill and prudence which was humanly possible. It is sufficient to say in reply that, in view of the entirely uncontradicted testimony in this case, it was only necessary to inquire whether the defendant had rebutted the presumption of negligence which arose from the mere facts of the injury. There was nothing in the case but the mere presumption. All of the actual testimony as to the real facts of the occurrence tended in a most eminent degree to show that there was no negligence for which the company was responsible, and that the injury was the result of the willful criminal trespass of a stranger. In such circumstances the highest inquiry that could legitimately be conducted by the jury was whether there was any negligence on the part of the defendant in the precautions taken against such an accident. That question was fully submitted by the learned Court to the jury, with instructions to find for the plaintiff if they found such negligence. The appellant's points on the subject of the highest possible degree of care were affirmed, and the remark of the Court below that the principle was very strongly expressed, was entirely correct in view of the manifest facts of the case. So, also, his expression of individual opinion that the precautions taken by the defendant were suf-

ficient to relieve them of the charge of negligence was appropriate and just in view of the testimony. He distinctly told the jury it was for them to decide the question, and left them entirely free to act upon their own judgment. In the case of Latch v. Rumner R. Co., 3 Hurlst. & N., 930, the plaintiff's trucks were derailed by the misplacement of the points of a siding. There the evidence showed that shortly before the accident a stone was found inserted under the lever of one of the points, and the defendant claimed that this had caused the accident, and, as it was the willful act of a stranger, they were not responsible. The judge who tried the case thought there was no evidence of actual negligence, and told the jury that if the defendant's account was correct they were entitled to a verdict, unless the jury thought there was negligence in not having a person to take care of the points, and he said he did not think there was. A verdict was rendered for the plaintiff, and on a rule for a new trial the case was heard en banc, and the rule made absolute. The Court said: 'There was evidence that there had been a willful act on the part of a stranger which would have caused the accident, and no evidence of negligence on the part of the defendants. None was suggested, except their not having a person always at the spot to look after the "points", which they were not bound to have. The siding had been in that state for months, and no accident had happened. The verdict was clearly contrary to the evidence, and there must be a new trial.' In this case there was no proof as to who had placed the stone under the lever, and the verdict had found negligence as a fact, but the Court set it aside as unwarranted by the testimony. Our own very recent case of Thomas v. Philadelphia & R. R. Co., 148 Pa., 180; 15 L. R. A., 416, affords a still more striking illustration of the inapplicability of the rule of the highest possible care, in the case of an injured passenger, and of the necessity of affirmative proof of actual negligence, before a recovery could be had. The facts and the conclusions of the Court are well

stated in the opinion of Chief Justice Paxson: 'On June 5, 1890, the appellant was a passenger on the cars of the defendant company, and in the vicinity of Pottstown was struck on the arm by a missile with sufficient force to cause a fracture thereof. It was not shown what caused the injury. The appellant did not see the missile, nor was it found in the car. There was no evidence that any one was near the train on the outside who could have inflicted the injury. This suit was brought to recover damages for the injury referred to. The theory of the appellant was that it was caused by a loose nut, thrown from one of the switches of the defendant's roadbed, over which the train was passing at the time. This was a mere theory, however, without any evidence to sustain it. The appellant contended that under the circumstances the question of the defendant's negligence should have been submitted to the jury. The Court took a contrary view of the case, and directed a verdict for the defendant. This was the error assigned.

* * * There was nothing in the evidence to connect the accident with any defect in the cars or machinery, the movement of the train, or in any of the appliances of transportation. There was nothing, therefore, to submit to a jury. It would be as reasonable to hold that a bullet fired into the car from without, by means of which a passenger is killed, is evidence of negligence on the part of the company.' It will be seen that in this case the rule that a presumption of negligence arises in favor of a passenger travelling on a train from the mere fact of the accident was refused application, and the rule that the highest possible care must be applied was denied enforcement, because there must be evidence to justify it in the intrinsic facts of the case. Neither of these rules, therefore, is of universal application, and the particular circumstances must be considered in order to determine how far they control the decision. Here the legal presumption was applied because the injury resulted from a collision of cars. But, the presumption having been fully rebutted by proof that

the collision was the result solely of the criminal act of a stranger, it suffices no further purpose."

See also:

Whipple v. Michigan Cent. Ry. Co., 90 N. W., 287;

Seaboard Air Line v. Thompson, 48 So., 750;
Sweeney v. Erving, 228 U. S., p. 237.

The last case above cited was submitted to a jury and the verdict was for the defendant. The language of the Court in that case will be construed by respondent to mean that every case in which the doctrine of *res ipsa loquitur* applies must be submitted to a jury. The Court, there, however, was construing facts growing out of a burn received by plaintiff when being treated by a physician by use of an X-Ray machine. The facts of the case are in no way analogous with those where the accident, so-called, is such as growing out of the derailment of a train. The Court there says, however:

"The general rule in actions of negligence is that the mere proof of an 'accident' (using the word in the loose and popular sense) does not raise any presumption of negligence; but in the application of this rule, it is recognized that there is a class of cases where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed, by the party charged with care in the premises, the thing that happened amiss would not have happened. In such cases it is said, *res ipsa loquitur*—the thing speaks for itself; that is to say, if there is nothing to explain or rebut the inference that arises from the way in which the thing happened, it may fairly be found to have been occasioned by negligence.

"The doctrine has been so often invoked to sustain the refusal of trial Courts to non-suit the plaintiff or direct a verdict in favor of the defendant, that the application of the rule, where it does apply, in raising a question for the jury, and thus making it incumbent upon the defendant to adduce proof if he desires to do so, has sometimes been erroneously confused with the question of the burden of proof. But in the requested instruction now under consideration the matter was presented in no equivocal form. Plaintiff's insistence was not merely that the evidence of the occurrence of the injury under the circumstances was evidential of negligence on defendant's part, so as to make it incumbent upon him to present his proofs; the contention was that it made it necessary for him to prove by a preponderance of the evidence that there was an absence of negligence on his part."

The question being passed upon by the Court was the alleged error of the Court in refusing to give a requested instruction, which is set forth in the opinion. The question was not raised as to whether the case should have been taken from the jury by a preemptory instruction, and doubtless that case was properly submitted to the jury. The portion of the opinion relative to submitting the case to the jury is not necessary to the decision of that case, is mere *obiter dictum*, and cannot be construed, we think, as authority for the position taken by respondent here.

From these somewhat extended quotations and the rules of law therein expressed, applied to the facts of this case, it seems to us to be most evident that the Court erred in all four particulars set forth in the Specifications of Error. There being no disputed question of fact, and no impeachment of any witness,

the Court was bound to direct a verdict for the defendant, as in a case where the evidence is undisputed, or is of such a conclusive character that the Court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.

Union Pacific Ry. Co. v. McDonald, 152 U. S., 262; Opinion on p. 284;
Delaware, etc., R. R. v. Converse, 139 U. S., 469, 472, and authorities there cited;
Elliott v. C., M. & St. P. Ry., 150 U. S., 245;
Anderson County Commissioners v. Beal, 113 U. S., 227, 241;
Mt. Adams Etc., v. Lowery, 74 Fed., 463;
Wright v. So. Express Co., 80 Fed., 85;
U. S. v. Meldrum, 146 Fed., 390;
Morse v. St. Paul, etc., Ins. Co., 129 Fed., 233, at 236.

In no event should the Court have treated the presumption as having the same effect as testimony, or as testimony, as was done in the instruction which is set forth in the second Specification of Error. The authorities are, we think, unanimous, that the presumption is not to be taken as testimony, but only in lieu of evidence in certain cases. The effect of this Instruction was to instruct the jury that there was evidence supporting plaintiff's case.

The motion for a new trial should have been granted upon this ground, if for no other, but it seems

apparent to us that so conclusive is defendant's case that nothing remains to be done but to direct a reversal of the judgment and a dismissal of the case.

Respectfully submitted,
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United States Circuit Court of Appeals

For the Ninth Circuit.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a corporation,

Plaintiff in Error,

vs.

SARAH J. IRVING,

Defendant in Error.

ANSWER BRIEF.

*Upon Appeal from the United States District Court
for the Eastern District of Washington,*

Northern Division.

Ex parte

Ex parte

DANSON, WILLIAMS & DANSON,

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Spokane, Washington.

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A N S W E R B R I E F.

*Upon Appeal from the United States District Court
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Attorneys for Defendant in Error.

Spokane, Washington.

ARGUMENT.

The defendant in error brought action to recover damages for personal injuries received in a wreck while a passenger on the plaintiff in error's train. Defendant in error placed in evidence the fact that she had been accepted as a passenger; that the car in which she was traveling was derailed; and that the derailment resulted in injuries, the nature and extent of which are not now called into question. (Trans., 28-31.) Plaintiff in error contended and adduced evidence for the purpose of showing that the derailment was not due to negligence on its part but was caused by the malicious acts of unknown persons. The court submitted to the jury the evidence relied upon as a defense, and they determined that the evidence did not negative the inference of negligence arising from proof of the derailment and the resulting injury to the defendant in error.

Res Ispa Loquitur.

The facts proven by defendant in error made a case of negligence on the part of the plaintiff in error under the doctrine of *res ipsa loquitur*, the thing speaks for itself, placing upon the carrier the burden of proving itself free from negligence:

The New Jersey Railroad & Transportation Co. v. Pollard, 89 U. S., 341; 22 L. Ed., 877;

- Stokes v. Saltonstall*, 38 U. S., 181; 10 L. Ed., 115;
- Albion Lbr. Co. v. De Nobra* (9th Cir.), 72 Fed., 739, 741;
- Hopper v. Denver & R. G. R. Co.* (8th Cir.), 155 Fed., 273, 278;
- Patterson v. Jacksonville Traction Co.* (5th Cir.), 213 Fed., 289, 291.

The principal question presented for determination is whether the facts which give rise to an inference of negligence according to the *res ipsa loquitur* doctrine are entitled to weight as evidence of negligence, or do they serve only to change the order of proof. If they constitute evidence of negligence, evidence adduced by the defendant for the purpose of negativing negligence creates but a conflict of evidence. If those facts serve only to put the defendant to its proof, as plaintiff in error contends, then any showing, however weak, which would be entitled to consideration as tending to show defendant's freedom from negligence would overcome the inference of negligence arising out of the derailment and injury to a passenger, and there would be no conflict of evidence, in the absence of a further showing by the injured passenger.

Before reviewing the decisions, the nature and function of the *res ipsa loquitur* doctrine should be considered: The doctrine grew out of the principle that one who has within his control the means

of proof should be required to produce it. The one who has the management and control of the instrumentality which causes the injury has it within his power in most cases to produce or withhold the evidence showing negligence or freedom from it, therefore, where the injury is received under circumstances that do not ordinarily exist in the absence of negligence on his part, the defendant is required to show freedom from negligence. The doctrine is especially applicable to derailment cases. A passenger is not in a position to do more than prove the occurrence; the carrier alone has access to the evidence that will show whether or not the occurrence was the result of negligence as borne witness to by the occurrence itself. If it sees fit to withhold evidence of its negligence, the passenger is helpless. If bound to give direct evidence of the negligent acts which caused the derailment, the plaintiff would be at the defendant's mercy and a recovery could never be had. If the evidence which the defendant sees fit to produce—always indicating freedom from negligence—must be accepted as all of the evidentiary facts and as true unless rebutted, the plaintiff would be just as much at the defendant's mercy as if the defendant were not required to produce any evidence; the passenger is in no better position to rebut the showing which the carrier makes than in the first place to offer proof other than the occurrence and the injury. The *res ipsa loquitur* doctrine would be without practical effect,

if the showing of injury by a derailment while a passenger on the defendant's train, were entitled to no weight as against the carrier's evidence—evidence confined to that which is self-serving.

Defendant in error contends that a derailment of a train upon which passengers are carried is of itself such *evidence* of negligence that it gives rise to a conflict when controverted, and, that it is for the jury to determine whether or not the carrier's evidence counterbalances it. The plaintiff in error does not contend and could not successfully maintain that the court may direct a verdict where there is a conflict in the evidence. It assumes that there is no conflict; that the evidence adduced by it stands uncontroverted. This is due to a misconception of the effect of defendant in error's evidence; to the incorrect assumption that it gave rise to a bare presumption which vanished in the presence of evidence.

United States Supreme Court decisions are controlling:

"Nevertheless it is contended by the learned counsel for the plaintiff, when the occurrences connected with the injury were proved, that, and upon the doctrine *res ipsa loquitur*, such proof, *per se*, showed that the defendant had been guilty of negligence, and that, under the doctrine of the Kentucky Court of Appeals announced in the case of *Morgan v. C. & O. Ry. Co.*, 105 S. W. 961, 32 Ky. Law Rep. 330, 15 L. R. A. (N. S.) 790, the onus at once shifted to the defendant, which, in order to exonerate itself, must show that it had used due care to inspect and keep in good order

the ladder in question. If we assume that that case upholds the doctrine indicated, nevertheless, as this is a question of general jurisprudence and not of local law merely, we must follow the rules, if any, laid down for us by the Supreme Court or by the Circuit Court of Appeals of this circuit.” (532.)

Patton v. Illinois Cent. R. Co (Ky.), 179 Fed., 530.

See also:

11 Cyc., 890.

In Sweeney v. Irving, 228 U. S., 233, 240; 57 L. Ed., 815, 819, the court held that an occurrence which calls for the application of the *res ipsa loquitor* doctrine is of itself “circumstantial evidence of negligence” and “is evidence to be weighed” by the jury.

The Sweeney case establishes that facts which warrant the application of the *res ipsa loquitor* doctrine are evidentiary. While the court was not called upon to decide whether or not they would create a conflict when opposed to evidence adduced by the defendant, it necessarily follows that the defendant’s evidence could do nothing more than create a conflict of evidence, the determination of which would be for a jury. Earlier decisions as well as logic would have called for such a conclusion had the question been presented:

“The law is that the plaintiff must show negligence in the defendant. This is done

prima facie by showing, if the plaintiff be a passenger, that the accident occurred. *If that accident was in fact the result of causes beyond the defendant's responsibility, or of the act of God, it is still none the less true that the plaintiff has made out his prima facie case.* When he proves the occurrence of the accident, the defendant must answer that case from all the circumstances of exculpation, whether disclosed by the one party or the other. They are its matter of defense. And it is for the jury to say, in the light of all the testimony, and under the instructions of the court, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating circumstances.” (463. Italics ours.)

Gleeson v. Virginia Midland Ry. Co., 140 U. S., 435, 444; 35 L. Ed., 458.

Although some of the state courts have rendered erroneous decisions, due to a mistaken notion that the occurrence gives rise to a bare presumption which cannot oppose evidence, and to the failure to call to mind the function of the doctrine of *res ipsa loquitur*, the great weight of authority is in harmony with the law as announced in the United States Supreme Court decisions:

“The jury was not bound to take the statement of defendant's witness as true that the defect in the pole could not have been discovered by inspection. Were it otherwise, the injured party would usually be at the disadvantage of being concluded by the one-sided evidence of the carrier as to matters exclusively within the knowledge of its employe's.” (681.)

Donovan v. Kansas City Elevated Ry. Co.
(Mo.), 138 S. W., 679.

See also:

Turner v. So. Power Co. (N. C.), 69 S. E.,
767, 770.

“The jury were bound to put the facts and circumstances proved by the defendant into the scale against the presumption upon which the plaintiff relied, and in determining the weight to be given to the former as against the latter they were bound to apply the rule that the burden of proof was upon the plaintiff.” (753.)

Kay v. Metropolitan St. Ry. Co. (N. Y.),
57 N. E., 751.

“The usual and ordinary evidence in explanation available is in possession of defendants, peculiarly so in a case of this nature; this last condition being referred to by Connor, J., in *Womble v. Grocery Co.*, *supra*, as the basis of the maxim, and in such case as stated the question of defendant’s responsibility must be referred to the jury: not, as shown by these authorities cited, under any presumption changing the burden of the issue, but as a cause in which evidence has been offered, from which negligence on the part of the defendant may be inferred. Speaking to this special feature of the doctrine in *Womble’s* case, it is said: ‘The principle of *res ipsa loquitur* in such cases carries the question of negligence to the jury, not relieving the plaintiff of the burden of proof, and not, we think, raising any presumption in her favor, but simply entitling the jury, in view of all the circumstances and conditions, as shown by plaintiff’s evidence, to infer negligence and say whether upon all the evidence, the plaintiff has sus-

tained his allegations.' Where the application of the doctrine we are discussing is properly called for, its effect and operation are not displaced or removed because there is testimony offered which if accepted by the jury, would exonerate the defendant, for in all such cases the credibility of the evidence relevant to the inquiry is for the jury; they may accept or reject it." (770.)

Turner v. So. Power Co. (N. C.), 69 S. E., 767.

"Nor can we concur in the view of appellant's counsel that the record in this case discloses no cause of action in plaintiff. The evidence is undisputed that the train was thrown from the track by the fracture of one of the steel rails while passing over it and transporting plaintiff, who was a passenger. Beyond question this made a *prima facie* case for plaintiff, which made it the duty of the court to submit the issue of negligence to the jury, despite the fact that appellant introduced evidence tending to show that the rail which broke was of standard size, properly laid, and attached to the ties; and that it had been in use less than four years, and according to the testimony of appellant, furnished indication of a fresh break, and disclosed no apparent flaw; and that it had been tested at the factory, and had been observed to be in seemingly good condition by the section foreman while walking over the track and inspecting the same on the day previous to the accident.

"This case falls strictly within the rule of *res ipsa loquitur*, which affords a presumption of negligence as against a carrier whenever an injury is occasioned to a passenger by any defect in its train of cars or railway track which would not ordinarily have occurred had

its track and train been kept in the condition of safety prescribed by the calling in which it is engaged. *Norris v. Railway*, 239 Mo. loc. cit. 715, 144 S. W. 783; *Price v. Street Railway Co.*, 220 Mo. 446, 119 S. W. 932, Am. St. Rep. 588; *Partello v. Railway*, 240 Mo. loc. cit. 137, 145 S. W. 55; Thompson on Negligence, vol. 3, 2809, p. 275.

"In speaking of submitting the case to the jury, where such a presumption of negligence exists, it is said by a learned text-writer: 'The very nature of this presumption is such that it takes the question of the negligence of the defendant to the jury in all cases. It requires him to explain the accident consistently with the conclusion of due care on his part; and whether he succeeds in doing so is necessarily a question of fact for the jury. The judge cannot decide that he has done so without trying a question of fact, passing upon the credibility of witnesses, and deciding that an affirmative proposition of fact has been proved. This cannot be done in any jurisdiction where the system of trial by jury is properly understood and correctly maintained. Judges who undertake to perform this office in the place of juries usurp the office of juries and seize jurisdiction which, it may well be assumed, has not been committed to them by the Constitution or the laws of any American jurisdiction, federal or state.' Thompson on Negligence, vol. 3, 2773, p. 238; * * * *." (1062.)

Brown v. La. & M. R. R. Co. (Mo.), 165 S. W., 1060.

A number of decisions are collected in the following late case, in which it said:

"In fact, it may be said that, where a passenger is suing a carrier for injuries received, proof establishing this relation, together with the facts and circumstances of the wreck of the vehicle in which he is being transported, together with proof that he received injuries because of the wreck, makes a *prima facie* case of negligence against the carrier, casting upon the carrier the onus of showing by the evidence that it has exercised the utmost care for the safety of its passengers, and that the injury was not the result of any negligence upon its part. Indeed, this rule is not disputed. It is so generally applied in this country that it needs no further citation of authority; but, admitting the rule, the contention is here made that, although the circumstances of this case, as shown, made a *prima facie* case of negligence, yet when the railway company introduced evidence tending to show proper construction and due care, that this presumption was fully and finally rebutted, and that the court should have declared, as a matter of law, that there was no liability, unless plaintiff returned to his case and made proof of specific acts of negligence. On the other hand, plaintiff insists that the presumption and inference of negligence arising from the facts shown by him are not destroyed by the mere introduction of exculpatory evidence on the part of defendant; that, when such a condition arises, it is for the jury to determine whether or not the evidence of defendant is sufficient to rebut and destroy the presumption and inference of negligence. This brings us to the precise point to be decided. (1002.)

"We think from a reading of the foregoing authorities, and upon reason, that when, as in this case, plaintiff has shown that he was a passenger upon a common carrier, and that

the train upon which he was riding at the time had been wrecked, together with the circumstances attending the wreck, and that he has suffered physical injuries as a direct result thereof, thus making for himself a *prima facie* case, based upon the presumption and inference of negligence arising from the facts proven, and this presumption is answered by evidence of defendant tending to exonerate itself from any negligence, that the question as to whether this evidence is sufficient for the purpose is, ordinarily one to be determined by the jury." (1003.)

Midland Valley R. Co. v. Hillyard (Okla.),
148 Pac., 1001.

"The plaintiff is the widow of one who was killed by an accident on a steam-boat belonging to the defendant. Her husband had purchased a ticket, and gone upon the boat as a passenger. Within a very short time, and just as the boat was fairly clear of the wharf, a violent explosion occurred, which shattered the forward part of the boat, and hurled boards and fragments of timber into the air. Mr. Spear was badly bruised and died soon after. The explosion was followed by a dense, black smoke, but no fire seems to have been communicated to the shattered boat, which was immediately removed to a yard, outside the state, for repairs. All this appeared from the evidence of the plaintiff. If the evidence had closed here, it will not be doubted that the plaintiff would have been entitled to a verdict. * * * It was the duty, of the defendant, therefore, upon proof of the happening of an accident to a passenger by an explosion upon its boat, to take up the burden of proof which the law put on it, and show that the explosion was not due to the negli-

gence of the company or its employes. This duty the defendant's counsel recognized, and addressed themselves to its performance. They proved conclusively that the explosion was not of the boiler or machinery of the boat. They gave evidence tending to show that it was not due to gunpowder or to petroleum. Several of the officers of the boat, and others who examined it after the explosion, testified that they did not know what caused the explosion, or the nature of the explosive. Some evidence was given in support of a theory that dynamite had been taken upon the boat, by some unknown person, just before it left the wharf. This was all pertinent, and tended to show that the defendants were not in fault, but it was for the jury. Its value depended upon the appearance and manner of the witnesses and the degree of credibility to which they were entitled, and it was for them to say whether it was sufficient to overcome the legal presumption." (825-826.)

Spear v. Phil. W. & B. R. Co. (Pa.), 12 Atl., 824.

"Plaintiff having rested, defendant moved for a non-suit, but without avail, whereupon it produced evidence tending to show that the night was very stormy, the wind reaching a minimum velocity of 45 miles an hour, and an extreme velocity of 56 miles, which is not extraordinary; that the lines had been in use for seven years, but were of first class material, and that the wire in question had parted about midway between poles standing 130 feet apart; that the insulation was not broken, except at the point of fracture; that it carried 1,000 volts, but where broken the voltage was much less, being estimated at from 300 to

500; that the wires and their fastenings, and the poles upon which they were carried, were regularly inspected as often as once every other day by a competent electrician; that the company was equipped with the standard and best approved ground detectors, or appliances for detecting or discovering breaks and the grounding of its wires, and that on stormy nights it applied the test every half hour; that upon this occasion the detector did not indicate the parting of the wire, and that the first notice touching its condition came through a member of the police force; that there were no indications as to how the wire came to break; that they sometimes broke of their own accord, but the cause of the present fracture was ascribed either to the crossing of the wires in a gale, or to the blowing of a limb from a tree, or something of the kind across them, causing the current to pass from one to another, thus severing one of them by burning it at the point of contact. Both parties having rested, defendant moved the court to direct a verdict in his behalf, but this was also refused; and error is assigned both as it respects the motion for a judgment of non-suit and the one to direct the verdict. (992-930.)

"This brings us naturally to the question presented by the motion to direct a verdict. When plaintiff made a *prima facie* case, this imposed upon the defendant the burden of showing, as we have seen, that the fracture of the wire was a condition not due to its fault, or that it used due care in the construction and maintenance of its system, and that the accident was one that could not have been provided against by reasonable foresight and precaution. This burden should not be confused with the burden of making the better case as between the plaintiff and defendant. The plaintiff must have made the better case

in the end by the preponderance of the evidence. When the defendant produced its evidence, the case rested; and it became a matter for the jury to determine whether it had succeeded, or whether, notwithstanding its attempt at exoneration, plaintiff's *prima facie* case was even yet the stronger and more satisfactory. The questions to be passed upon were of fact, and it was not within the province of the court, under the evidence adduced, to say to the jury, by directing a verdict, that its exoneration had been substantiated, and therefore that plaintiff's *prima facie* case had been overcome. So there was no error in finally submitting the case to the jury. Railway Co. v. Nugent, *supra.*" (931.)

Chaperon v. Portland General Electric Co.
(Or.), 67 Pac., 928.

The last mentioned case is cited with approval in—

Abrams v. Seattle, 60 Wash., 356, 367-369;
111 Pac., 168, 172.

See also:

- III Thompson on Negligence* (2nd Ed.), Sec., 2770-2774;
- Dusenbury v. North Hudson County Ry. Co.* (N. J.), 48 Atl., 520;
- Emerson v. Butte Elec. Ry. Co.* (Mont.), 129 Pac., 319, 320;
- Sherman v. So. Pac. Co.* (Nev.), 115 Pac., 909, 910;

Simone v. Rhode Island Co. (R. I.), 66 Atl., 202, 203;
Chaffe v. Consolidated Ry. Co. (Mass.), 82 N. E., 497;
Eldridge v. Minneapolis St. L. Ry. Co. (Minn.), 20 N. W., 151;
Norfolk-So. R. Co. v. Tomlinson (Va.), 81 S. E., 89, 92;
29 Cyc., 634.

Credibility of Witnesses.

All of plaintiff in error's witnesses were employees by reason of whose acts negligence would be attributed to it if the occurrence was the result of negligence, as it bore evidence of being. For this further reason, the Court could not grant a directed verdict:

"Notwithstanding the testimony of these witnesses was so positive to the effect that they accepted the trust, we are of opinion that it was not improper to submit the question to the jury. In its charge the court instructed the jury that the creditors who accepted the deed of trust must themselves be free from the taint of fraud, and the question of fraud was so connected with that acceptance that it was possible for the jury to have found that the accepting creditors had knowledge of the fraud at the time of their acceptance. They were all apparently interested in sustaining the deed, and in denying all knowledge of a fraudulent intent, and while the jury has no right to arbitrarily disregard the positive testimony of unimpeached and uncontradicted witnesses (*Lomer v. Meeker*,

25 N. Y. 361, 363; Elwood v. Western U. Teleg. Co., 45 N. Y. 549, 553 (6 Am. Rep. 140), the very courts that lay down this rule qualify it by saying the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact. Munoz v. Wilson, III N. Y. 295, 300; Dean v. Metropolitan Elev. R. Co., 119 N. Y. 540, 550; Canajoharie Nat. Bank v. Diefendorf, 123 N. Y. 191, 200 (10 L. R. A. 676); Volkmar v. Manhattan R. Co., 134 N. Y. 418, 422." (495-496.)

Sonnentheil v. Christian Moerlein Brewing Co., 172, U. S., 401, 408; 43 L. Ed., 492.

The Volkmar case, the last one mentioned in the preceding quotation, is one in which the point was raised under circumstances somewhat similar to those existing in this case. The decision is reported in 31 N. E., 870, from which the following is taken:

"The evidence showed that the bolt was broken, and that in consequence the iron plate or clip fell upon the plaintiff. The structure was consequently out of repair, and under the circumstances, I think the presumption of negligence follows. (870.)

"The learned general term in its opinion admits this proposition, and concedes that the fall of the plate or clip, in the absence of an explanation, raises a presumption of negligence. That court, however, reached the conclusion that the presumption was overthrown by the evidence produced on behalf of the defendant. As we have seen, that evidence was

given by the witness Roach. It was his duty, as he testified, to examine carefully all rails, switches, signals, bolts, and fastenings of all kinds, and to keep them tight. He further states that in June, 1885, he was engaged in following out his instructions, and performed them to the best of his ability. In no place does he testify that he ever examined the bolt and clip which fell upon the plaintiff. He does not tell us how often he passed over the track, or to what extent he examined the bolt and fastenings. He only gives us his own conclusion that he performed his duty to the best of his ability. It does not appear to us that this was sufficient to remove the presumption which necessarily follows from the established fact that the bolt was broken, and in that particular the structure was out of repair and dangerous. But, even if this evidence was sufficient to remove the presumption, as held by the general term, the credibility of the witness would still be involved and be a question for the jury. This witness was the defendant's track walker. It was his duty to examine the bolt which was broken. If there was any negligence for which the defendant was chargeable, it was that of this witness. He was therefore a person interested, and possibly actuated by a motive to shield himself from blame." (871.)

The Volkmar case is commented upon and followed in—

Gibson v. Chi., Milwaukee, Etc., R. Co., 61 Wash. 639, 641-642; 112 Pac., 919, 923-924.

"Employes of a party, although they may not be affected by the verdict pecuniarily, are,

by the great weight of authority, to be deemed interested witnesses. This is especially true in actions against the master for the negligence of his servants. While the latter are competent witnesses for the former, their incentive to exonerate themselves from blame goes to their credit, and should be carefully considered in weighing their testimony."

30 *Am. & Eng. Encyc. of Law* (2nd Ed.),
1091.

"It is well settled that the credibility of witnesses is in all cases a question for the jury. The rule has been applied under an almost infinite variety of circumstances; as, for instance, where the witness is a party, or the relative of a party, or is interested, or a lunatic; whether the evidence of the party, or other witness, is contradicted or conflicts with testimony previously given by him, or conflicts with statements previously made by him, or is shaken on cross-examination, or whether the credibility of the witness is questioned, or his testimony given under circumstances such as would naturally throw discredit on him. So the rule applies, although the testimony of the party, or of interested witnesses, or of other witnesses is uncontradicted."

38 *Cyc.*, 1518-1521.

See also:

Missouri, K. & T. Ry. Co. v. Murphy
(Kan.), 52 Pac., 863, 864;
Lindenbaum v. N. Y., N. H. & H. R. Co.
(Mass.), 84 N. E., 129, 133;
Derine v. Murphy (Mass.), 46 N. E., 1066;

Howard v. Louisville Ry. Co. (Ky.), 105 S. W., 932, 933;

Brunswick & W. R. Co. v. Wiggins (Ga.), 39 S. E., 551, 552.

For the reason that all of plaintiff in error's witnesses were employees, as well as under the doctrine of *res ipsa loquitur*, the court properly submitted the case to the jury.

Review of Plaintiff in Error's Citations.

The decisions upon which plaintiff in error relies will be discussed in the order set out in its brief:

In the Beeman case, 79 Wash., 137; Brief, 11, the court was discussing the "presumption that the driver of a street car would not be negligent," not an inference of negligence arising from an occurrence which would not ordinarily take place in the absence of negligence.

"Presumption of a consideration" in support of a negotiable instrument was the subject under consideration in the Nicholson case, 77 Wash., 292, 298; Brief, 12.

In the Welch case, 46 Wash. Dec., 243; 153 Pac., 355, 358; Brief, 12-13, the court was discussing "the rule of evidence that a killing, unexplained, is presumed to be murder." Furthermore, the court did not hold that the defendant's showing was sufficient to warrant taking the case from the

jury. The court said that "the question for the jury was whether the *prima facie* case arising from the presumption attending the killing had been met." (359.) The court held, just as the court instructed the jury in this case, that the preponderance of the evidence must be with the plaintiff in order to recover. But there is a great deal of difference between that holding and the contention that the jury shall not pass upon the sufficiency of defendant's evidence to overcome the plaintiff's showing. The distinction between burden of proof and preponderance of evidence is not involved in this case, although that distinction made in the Welch case will serve to explain some of the other decisions which plaintiff in error relies upon to support its contention. Notwithstanding the court in that case was considering a bare presumption, and not the inference of negligence arising from evidentiary facts, and its decision would not be in point even though it had held that there was nothing to go to the jury, in so far as the case has a bearing, it is contrary to plaintiff in error's contention. The case was sent back for a new trial so that the jury could determine, under proper instructions on preponderance of evidence, whether or not the defendant's evidence met plaintiff's showing.

The Omaha St. R. R. Co. case, 105 N. W., 303; Brief, 13-14, is another case in which the court was discussing an erroneous instruction on pre-

ponderance of evidence, and in which the case was sent back for new trial so that the jury might determine the question of negligence under proper instructions. That part of the opinion quoted by plaintiff in error is not contrary to defendant in error's contention. It is said, "But when the proof of such accident *is met*," etc. That the jury is to determine when it "*is met*" is clearly indicated by another paragraph of the Court's opinion:

"The defendant asked the court to instruct the jury to the effect that, although they found that the car was derailed, yet if they found that, at the time and place of the accident, the car and track were in good order and condition, and without defect or imperfection, the presumption arising from the derailment of the car would be thereby overcome. It was not error to refuse this instruction because it ignores the inference of negligence in the operation of the car, which the jury might legitimately draw from the fact of derailment."

The notes following the report of that case in 4 L. R. A. N. S., 122, do not relate to this question at all; they deal with the degree of care which a carrier must exercise.

The following statement shows clearly that plaintiff in error does not grasp the nature of the rule of law under discussion: "The circumstances of some of the cases are such that the court may properly submit the cause to the jury under proper instructions." Brief, 14. If the plaintiff's show-

ing were but a bare presumption that served no purpose except to change the order of proof, no case in which the plaintiff failed to adduce evidence in rebuttal of the defendant's evidence could be properly submitted to a jury, for the apparent reason that plaintiff's showing would not create a conflict with defendant's evidence, and there is nothing for determination by a jury in the absence of a conflict in the evidence.

A further quotation from the Scarpelli case, 63 Wash., 18; 114 Pac., 870; Brief, 14-15, will give light on that decision:

"When a plaintiff in actions of this character makes no attempt to show the negligent cause of the act complained of, but relies wholly on the legal presumption of negligence his facts establish, he must accept or controvert the defendant's explanation as to the cause of the act, and show its insufficiency or other non-applicable features, if he would prevent the court from holding, as a matter of law, that the presumption is overcome.

"'The rule of law is, doubtless, that, where there is no conflict of testimony, where the existence of a fact is clearly proved by the undisputed testimony, the court should hold that the fact is established.' Spaulding v. Chicago & N. W. R. Co., 33 Wis., 582.

"Referring to the contention of appellants that the question whether the testimony introduced for the purpose of overcoming such presumption is sufficient for that purpose and should be submitted to the jury as a question of fact, it is said, in answering the same contention in the Spaulding case:

"The argument would probably be a sound one were this a presumption of fact. Its weight and force and consequently the amount of proof essential to overcome it, would in such case be for the jury and not for the court, to determine. But the presumption under consideration is clearly one of law and is governed by an entirely different rule. Its weight and effect, and the amount and character of the proof necessary to overcome it, are questions for the court. * * * In such cases, if there is a conflict of testimony, the jury must determine what facts are proved; but where as in this case there is no such conflict, and the testimony is clear and satisfactory against the presumption, it is the duty of the court to hold as a matter of law that the presumption is overcome.'

"The same rule is announced in Menominee River Sash & Door Co. v. Milwaukee & N. R. Co., 91 Wis. 447, 65 N. W. 176; Central of Georgia R. Co. v. Waxelbaum, 111 Ga. 812, 35 S. E. 645; Baltimore City Pass R. Co. v. Nugent, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161; Woodward v. Chicago, M. & St. P. R. Co., 145 Fed. 577.

"In Peters v. Lohr (S. D.), 124 N. W. 853, the court, in speaking of the effect and character of 'Presumptions,' says:

"A presumption is not evidence of anything, and only relates to a rule of law as to which party shall first go forward and produce evidence sustaining a matter in issue. A presumption will serve as and in the place of evidence in favor of one party or the other until *prima facie* evidence has been adduced by the opposite party; but the presumption should never be placed in the scale to be weighed as evidence. The presumption, when

the opposite party has produced *prima facie* evidence, has spent its force and served its purpose, and the party then, in whose favor the presumption operated, must meet his opponents' *prima facie* evidence with evidence and not presumptions. A presumption is not evidence of a fact, but purely a conclusion. Elliott, Ev., Par. 91, 92, 93; Wigmore, Ev., Par. 2490, 2491.'

"Appellants not having attempted to lessen the probative force or value of respondent's testimony, either in their main case or in rebuttal, cannot make a controverted question of fact out of that over which there is no controversy, nor treat as a disputed issue of fact that over which there is no dispute. The court was therefore justified in ruling as upon a question of law." (24-25. Italics ours.)

It is apparent from the above quotation that the court fell into error by assuming that the deduction of negligence that may be drawn from facts placed in evidence—facts that of themselves cause men to associate them with negligence—is a presumption such as may be likened to "Bats flitting in the twilight, but disappearing in the sunshine of actual facts." "Presumption" is a term that is variously used and is therefore ambiguous when used as a general term. Inferences to be drawn from facts placed in evidence are very different from those rules of law which govern the order of proof, although the term "presumption" is applied to either in many cases. The distinction is noted in the following:

"It has undoubtedly been held, in several cases, that a jury may very properly presume

a servant's wages have been paid, when it appeared that the custom was to pay them at stated periods, and that a considerable time had elapsed without any claim. But presumptions are properly divided into two classes, *viz.*, presumptions of law and presumptions of fact. Presumptions of law are such as are conclusive or absolute; that is, such as are not permitted to be overcome by proof that the fact is otherwise, or such as are termed disputable presumptions; that is, such as admit of contrary proof, but which, in the absence of all opposing evidence, make a *prima facie* case, and throw the burden of proof on the other party. When presumptions of this class arise it is the duty of the court to instruct the jury that they are bound to find in favor of the presumption.

"Presumptions of fact are of an entirely different character and are in truth but mere arguments and differ from presumptions of law in this essential respect, that while those are reduced to fixed rules and constitute a branch of the particular system of jurisprudence to which they belong, these merely natural presumptions are derived wholly and directly from the circumstances of the particular case, by means of the common experience of mankind, without the aid or control of any rules of law whatever. These cases fall within the exclusive province of the jury. They are usually aided by the advice and instructions of the judge, more or less strongly urged at his discretion; but the whole matter is to be decided by themselves, according to the conviction of their own understanding." (150-151.)

Snediker v. Everingham, 27 N. J. Law, 143.

"The distinction between presumptions 'of law' and presumptions 'of fact' is in truth

the difference between things that are in reality presumptions and things that are not presumptions at all."

4 *Wigmore's Evidence*, 2491.

See also:

United States v. Sykes (N. C.), 58 Fed., 1000, 1005;

United States v. Searcey (N. C.), 26 Fed., 435;

Cook v. Dowling, 26 N. Y. Suppl., 764, 765;

Doane v. Glenn, 1 Colo., 495, 504;

Bow v. Allenstown, 34 N. H., 351; 69 Am. Dec., 489, 496;

6 *Words & Phrases*, 5537-5540.

In the Scarpelli case, the court refers with approval to a statement in the Spaulding case (chiefly relied upon as authority for the court's holding) that a contention such as defendant in error makes "would probably be a sound one were this a presumption of fact." That court and the Washington Court did not distinguish between a bare presumption or rule of law fixing the order of proof (a "presumption of law") and the deduction or inference which may be drawn from facts in evidence (sometimes inaccurately termed "presumption of fact"). The argument is based upon a false premise, and consequently the decision is unsound.

The United States Supreme Court cases, as well as the other cases where the nature of the *res ipsa*

loquitur doctrine was given due consideration, establish that it relates to facts constituting evidence, and not to a bare rule of law fixing the order of proof. Of course, United States cases are of controlling effect on questions of this nature, even though the Washington cases were entitled to consideration as precedents.

The Woodward case, 145 Fed., 577; Brief, 15-16, is not in point. The court was considering a presumption created by statute, not the common law doctrine of *res ipsa loquitur*. The court adopted the state court's construction of the statute. The state court held that the statute affected nothing but the order of proof; that is, established a rule of local practice, which is made binding upon the Federal Courts by the United States Conformity Statute.

U. S. Rev. Stat., Sec., 914;
11 Cyc., 879-890.

This court is considering a rule of general law, and, consequently, the Woodward decision is inapplicable. If the court intended to announce a general rule of law, its opinion is to that extent *obiter dicta* and unsound.

The same judge that decided the Woodward case did write a dissenting opinion in the Great Northern Ry. Co. case, 115 Fed., 452; Brief, 16-22, but based his opinion on the grounds that the presumption of negligence arising from the escape

of fire from the company's premises was a rule of local practice and was of like nature as the presumption of ownership arising from the possession of property, a bare presumption of law and not an inference that may be drawn from evidentiary facts. He said:

"The presumption of negligence in the operation of a locomotive which arises from the fact that it scatters sparks or coals or sets a fire is neither more sacred nor more conclusive than the presumption of ownership, which arises from the possession of property, or the presumption of the relation of one riding in a car to a carrier which arises from his riding on its railroad in its passenger car, or from any other disputable presumption of fact; and it ought to receive no different measure of consideration. (460.)

"This rule that the presumption of negligence from the setting of a fire is, as a matter of law, overcome by the uncontradicted testimony of witnesses that due care was exercised, is a rule of evidence, a rule of practice, a rule which simply measures the force and effect of a disputable presumption of fact in the trial of fire cases in the states of South Dakota, North Dakota, Minnesota, and perhaps in other states; and in those states it ought to and does obtain in the federal courts, as well as in the state courts, because it is a just and rational rule, and because the act of congress provides that the practice, forms and modes of proceeding in actions at law in the national courts shall conform, as near as may be, to the practice, forms and modes of proceeding existing at the time in like causes in the courts of record of the state

within which the federal courts are held. Rev. St., Par. 914." (461.)

A question of local practice is not before this court, and the United States Supreme Court has held the *res ipsa loquitur* inference of fact to be evidence which may be weighed by the jury.

In the majority opinion in the Great Northern Ry. Co. case, it is said:

"Learned counsel for the railroad company do not controvert these propositions, but they assert that the trial court should have told the jury, in substance, that the engine was properly managed, and that the company was guilty of no negligence in that respect, and that a reversible error was committed in not eliminating that issue from the case.

"We think that these propositions are untenable. The testimony introduced by the plaintiff, that his property had been destroyed by a fire kindled on the right of way of the railroad by coals, cinders, or sparks emitted by a passing locomotive, if the jury believed such to be the fact, as they must have done, cast on the defendant company the burden of overturning the presumption of negligence thus raised; that is to say, the burden of showing that the locomotive was properly handled or operated, and that due care had been exercised in the construction and equipment of the same and in keeping it in repair, so as to prevent the emission of cinders and sparks, so far as that end could be attained without impairing its efficiency. McCullen v. Railway Co., 41 C. C. A. 365, 101 Fed. 66, 70. This presumption could only be overcome by testimony, and, unless we apply to this class of cases a rule different from that which is

applied in other cases, it was the province of the jury to determine the weight that should be accorded to the testimony which was introduced for that purpose, and also to determine the credibility of the witnesses who testified on that subject. * * *

“* * * We cannot well understand upon what theory the statement of persons, who were in charge of a locomotive when it occasioned a disastrous fire, that it was properly and prudently managed, etc., must be accepted by a court as conclusive, and as overturning, as a matter of law, the presumption of negligence raised by other testimony. It would seem, rather, that the triors of the fact ought, in such a case, to consider how far the interest of such witnesses—their natural desire to absolve themselves from all blame—may have colored their evidence, and how far their statements are consistent with other facts and circumstances which have been proven. If a court undertakes to weigh such evidence, and say that the witnesses are credible, and also to decide as to the effect of the proof, it plainly assumes the functions of the jury, or at least a function which is discharged by the jury in other cases.” (454-455.)

The Spaulding case, 33 Wis., 582; Brief, 22, has been discussed in connection with the Scarpelli case. The court assumed that *res ipsa loquitur* is but a “presumption of law” as distinguished from a “presumption of fact.”

In State v. Hodge, 50 N. H., 510; Brief, 23, the court was discussing the presumption of law that one in possession of stolen personal property is presumed to be the thief.

Section 2491 of Wigmore's work on evidence makes the distinction Defendant in Error is pointing out.

I Elliott on Evidence, Sec., 92; Brief, 24, is squarely against plaintiff in error's contention. The author states that "the evidential facts upon which the presumption is based * * * may take their place with the rest and operate with their own natural force as a part of the entire mass of evidence or probative matter, and thus be put into the scale and weighed with the rest. * * *" The jury is entitled to draw the inference from the facts proven, that is, give weight to the facts, under the rule as stated by the author.

What the court did in this case was to submit to the jury the facts of the derailment and injury to a passenger to be weighed as evidence of negligence, that is, gave the jury the right to infer negligence from those facts notwithstanding there were other facts in evidence from which a contrary inference might be drawn.

In the Gibson case, 58 N. E., 278; Brief, 24, the court announced the familiar rule that where the cause of an accident appears from the evidence the doctrine of *res ipsa loquitur* does not apply. That rule does not apply to this controversy for the reason that whether the cause of the accident appears from the evidence is a controverted question of fact.

It would take an unwarranted amount of space to review all of plaintiff in error's citations. What has been said will apply to the rest of them. The only authority it has cited relating to the undisputed testimony of employees, lines up with the authorities defendant in error cites on that phase of the controversy. The citations on the other point are readily distinguishable. Upon both theories, the law sustains the lower court's ruling.

Review of Evidence.

If plaintiff in error's contention that the evidence in some *res ipsa loquitor* cases is such that the court may direct a verdict were sound, its showing in this case would not make it of that class.

There is no evidence in the record suggesting a motive for anyone going upon plaintiff in error's right of way and wantonly causing the derailment of a train. It is scarcely conceivable that anyone would do such an atrocious thing. It would take a far better showing than that made—assuming that the testimony of the employees were accepted as true—to convince reasonable men that plaintiff in error's contention was based upon anything but theory and speculation. The theory is farfetched. It never became a probability under the evidence.

The most favorable view of the evidence discloses nothing but a derailment; one end of a rail

subsequently found to be out of alignment; an indentation apparently the result of the flange of a wheel coming in contact with the end of the receiving rail; spikes missing for about half a rail's length; a broken angle bar near the ends of the disjointed rails; angle bars, bolts and spikes found among the weeds at the foot of the embankment and about opposite the point where the rails were disjointed, the bolts bearing no "evidence of having been broken off"; and, the next morning a discovery of a claw bar and a track wrench on the abutment of a viaduct, a "long block" or one thousand feet distant from the derailment. (Trans., 46, 48, and 94.) That is the extent of the evidence upon which the finespun caused-by-trespassers theory is built.

The trainmaster, Hasenbalg, who claims to have found the bolts, etc., in the weeds (Trans., 45), did not arrive at the scene of the derailment until an hour after it happened, and until after the tourist and sleeping cars had been re-railed and taken away. (Trans., 44 and 47.) No witness knew how the things came to be where he found them, or what connection, if any, they had with the wreck. (Trans., 46, 48, 86 and 95.) That employees had placed them there would be far more likely than that trespassers had hidden them. That they had any connection with the derailment was not shown; it was surmised.

Another witness, Lempke, testified that he found

the bolts, wrenches, etc., although he states that Hasenbalg was with him. (Trans., 92.) The latter made no statement that he was accompanied by anyone. (Trans., 45-48.) Lempke also testified that he found a crowbar and a monkey wrench two hundred feet out in the prairie. (Trans., 93.) To the jury it no doubt looked very much as if the neighborhood had been pretty well strewn with tools and railroad equipment.

None of the witnesses were on the ground until more than half an hour had elapsed after the derailment. (Trans., 49, 52, 53, 61 and 92.) The superintendent of terminals, Rupp, testified that he saw an angle bar in between the ends of the rail (Trans., 50), but the roadmaster, Burke, testified that a piece of an angle bar was inside and another piece of it outside of the rail. (Trans., 70-71.) The special agent, Lempke, adopted Burke's version. (Trans., 92.) Hasenbalg did not notice anything between the rail ends. (Trans., 45.) The assistant superintendent of terminals, Bush, thought "the angle bar was in there" but could not remember. (Trans., 54 and 57.) The evidence does not warrant even an inference that there was an angle bar holding the ends of the rails out of contact. Whether there was an angle bar or but two pieces of bar at that point, the position may have been changed prior to the time of which the witnesses speak—long before they came, passengers were there, and the witnesses could not tell if the angle bar or pieces had been

handled. (Trans., 95.) Furthermore, it was conceded by an expert that when a train leaves the track existing conditions are greatly changed. (Trans., 78.)

Plaintiff in error laid great stress upon the impression in the end of the rail, the theory being that the flange of the forward engine wheel had made the mark, and that it indicated that the rail was out of place before the train arrived at that point, which, if true, would negative spreading of the rails by the train. The roadmaster stated that it would be hard to distinguish between marks of the engine and those made by the baggage car. (Trans., 81.) An examination of this mark on the rail discloses that if made by the flange on a car wheel, it was at an angle of twenty or more degrees from a line parallel with such rail. If made by the flange of an engine wheel, the result was that the engine was then headed at such an angle which would have caused it to have gone over the embankment (but ten feet from the track) instead of proceeding down the track and then heading in an entirely opposite direction. (Trans., 80-84.) The law of moving bodies would prevent any other result, and the force exerted by the coaches in the rear, would have increased this tendency. It is manifest, therefore, we think, that the indentation on the rail was not caused by the flanges of the engine wheels. If caused by any wheel in this train, it must have been a wheel on the tender or some coach. If this mark was made

by a car wheel back of the engine, the pulling power of the engine would have a tendency to right the truck of such car and produce exactly the result that was found following this wreck. We think this physical fact, together with the evidence, proves conclusively that this spreading of the rails, which is discussed by the witnesses, occurred after the engine had passed that point. (Trans., 80-84.)

The witness could not tell where the engine or cars left the rails. (Trans., 85.) The forward trucks of the tourist car had run upon the ties about 80 or 90 feet before that car came to a stop (Trans., 68), and the rear of the forward trucks was then directly at the point of the break in the rails. (Trans., 68, 85 and 92.) The cause of the front trucks of the tourist car leaving the track before it had reached the point where it is claimed the cause for derailment existed is unexplained. It is all a matter of conjecture. That it was a derailment is the only definite thing.

The probabilities are that employees removed the spikes, bolts, and angle bars, if they were removed by any person, and then neglected to replace them. Even though trains may have passed over that point after employees had worked upon the track, it does not necessarily alter the probabilities. The track might have withstood the strain of passing trains for a time, even though not held in place by all of the bolts and spikes ordinarily serving that purpose. The greatest strain was on the op-

posite rail. Where there is a weakness, there must come a time when it yields to the strain, but the mere fact that it has withstood the strain up to a certain time does not prove that the weakness did not exist where it later gave way. Further, it should be remembered that this train was being operated at a higher rate of speed than the other trains, which would cause a greater strain. (Trans., 59 and 97.) The break of the rails was on the inner side of the curve (Trans., 35 and 53), and bodies moving in a circle according to natural law, tend to follow the tangent. Trains are held to the curve of the track by the resistance offered by the outer rail, consequently the strain is much less on the inner rail. (Trans., 71-72.) The cause of the derailment is within the realm of uncertainty and conjecture, and it is the jury's function to consider probabilities.

The evidence relating to inspection and care on the part of the employees does not show freedom from negligence.

If the break in the rails were not made by the engine or some one of the cars, it should have been seen by the engineer or fireman. There was no obstruction or anything to prevent the engineer and fireman from observing the condition of the track as they approached this point. (Trans., 51.) The testimony shows that on a straight track the headlight would throw light upon the track for three or four blocks. (Trans., 59.) It will be re-

called that the blocks referred to by the witnesses were about one thousand feet long. This was a one degree curve, a very slight deflection from a straight line. (Trans., 60-61 and 90.) The engineer was not watching the track ahead of him, at least he saw no defect in the track. (Trans., 99-100.) A break in a ribbon of steel reflecting light from an engine ought to be readily noticed. It undoubtedly would have been noticed had it been there. The roadmaster stated that if the receiving rail was out of line as plaintiff in error would have it, the engine would jump when the flange of the front wheel came in contact with the end of the displaced rail, assuming that it was going twenty-five or thirty miles an hour. (Trans., 73.) The speed it was traveling was about thirty miles an hour. (Trans., 98.) The engineer felt no jolt or jar at the time or just before the engine left the rails. (Trans., 98.) The evidence indicates that the break was made by the train itself, but, if not, had there been a proper lookout, the break undoubtedly could have been seen by the engineer or fireman.

It was the duty of the section foreman, Hegger, to inspect and repair the tracks daily, tighten the bolts, etc., at this point. It was his duty to inspect four tracks, each being between one and a half and two miles in length. (Trans., 31-32.) An hour and a half to two hours of his time was devoted to inspecting the tracks. (Trans., 38.) He

was, therefore, inspecting four miles of track an hour, and he walked while making the inspection. (Trans., 33 and 38.) It requires considerable ability to cover four miles an hour, without taking the time necessary to inspect the rails to see if the joints were well bolted and in good condition. An ordinary man would not do it. He even took a much faster pace than four miles an hour, for as he walked down each track, he "zigzagged" from one to the other side of the track so that he could examine the bolts on the outside as well as on the inside of each joint of both lines of rails. (Trans., 40-43.) That was far too remarkable a performance to be believed by the jury. Either the witness was exaggerating the facts, or the inspection was carelessly performed. It was for the jury to pass upon the credibility of the witness, and to determine the nature of the inspection.

The roadmaster's inspection was of an equally doubtful character. He had two hundred and eighty-nine miles of track under his "jurisdiction." (Trans., 60.) His inspection was made from the rear end of a train. (Trans., 61-62.) If he examined the tracks daily, even though ten hours was his work-day, he would be passing over the tracks at thirty miles an hour without taking out time for stops. If he only covered part of the track daily, it would be questionable whether his memory could be relied upon to bring to mind what he had done the day of this derailment,

which occurred in March, 1914. Even though his statement that he was traveling at the rate of fifteen or twenty miles an hour when passing over this place were true, his statement that he could observe whether or not spikes or bolts were missing (Trans., 88) would not be entitled to very serious consideration, and especially as he was riding home from work. (Trans., 61-62.)

There is another important factor in this case. The witnesses did not reach the scene of the derailment for over half an hour after it took place. There is no evidence that conditions remained unchanged until they arrived. The engineer, who did not testify as to the conditions, was the only member of the train crew called upon to testify. The members of the crew no doubt examined the break prior to any witness who gave testimony in this case. The presumption is, had their testimony been favorable, it would have been introduced. There was a demand for the exercise of the functions of a jury.

If it would aid the court, and brevity did not forbid, other inconsistencies might be pointed out, demonstrating the soundness of the rules which denies conclusive effect to the defendant's showing in this class of cases.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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United States Circuit Court of Appeals
For the Ninth Circuit.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation,

Plaintiff in Error.

vs.

SARAH J. IRVING,

Defendant in Error,

PLAINTIFF IN ERROR'S REPLY BRIEF

Upon Appeal from the United States District Court
for the Eastern District of Washington,
Northern Division.

File

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United States Circuit Court of Appeals For the Ninth Circuit.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation,

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PLAINTIFF IN ERROR'S REPLY BRIEF

*Upon Appeal from the United States District Court
for the Eastern District of Washington,
Northern Division.*

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Much space is occupied in the Brief of Defendant in Error in an attempt to constitute the bare *presumption* of negligence the equivalent of evidence, for the purpose of establishing an issue for the jury. The definitions quoted from the various opinions of Courts and text writers, with ever changing phraseology, refer to the presumption arising from the doctrine of *res ipso loquitur* as one of fact, one of law, and as a rule merely determinative of the burden of proof or of the duty to go forward with proof. Much confusion exists apparently in defining the nature of the presumption. In our humble judgment, it is not important whether it be called a presumption of fact or a presumption of law. In either event, it is properly "but a rule of law fixing the order of proof"; as said by Judge Chadwick in Nicholson v. Neary, 77 Wash., 295, or "it is nothing but an artificial, rebuttable presumption of fact whose sole office is to change the burden of proof"; as Judge Sanborn said in Woodward vs. C., M. & St. P. Ry. Co., 145 Fed., 577; or as said by Mr. Hammon in his work on Presumptions (p. 47) as quoted on page 25 of our opening brief, presumptions, "In themselves, however, they are not evidence, although for the time being they accomplish the result of evidence. They are simply a process which aids and shortens inquiry and argument."

The rule applied to this case, requires the defendant to produce the facts. The facts do not permit of any inference consistent with the presumption of negligence. In other words, the evidence furnished

by the fact of the derailment is, upon the facts produced and which show the cause of the derailment, consistent with the presumption of due care, and not with any presumption of negligence.

“Finally, it is said that inasmuch as the presumption that the deceased was a passenger of the company, arose from the facts that the yard master was in possession of the train, operating it on the track of the company, and the deceased was riding therein, there was some evidence for the jury in support of the claim of the defendant in error, and the case was properly submitted to them by the Court. But this argument loses sight of the fact that it is only when there is a dispute regarding material facts or a reasonable doubt as to the inference that must be drawn from the undisputed facts that the court is required to submit an issue to the jury. All the material facts in this case are proved without contradiction or dispute. The inference that must be drawn from them under the law is not doubtful. A presumption of fact, like that which the counsel for the defendant in error here invoke, is a mere inference from certain evidence, and, as the evidence changes, the presumption necessarily varies. A trial court is not bound to disregard a conclusive presumption which arises from all the evidence at the close of a case because at some time in the course of a trial counter presumptions arose.”

Chicago, St. P. M. & O. Ry. vs. Bryant, 65 Fed., p. 969-975.

To contend that the rule is otherwise is to give to a mere presumption greater importance than is given to any class of evidence. It would be to create a thing of fiction, and then give to it double importance; because when added to the scale when the facts

upon which it is based are shown would be to give double weight to the same facts.

Elliott on Evidence, Vol. 1, Sec. 92.

A review of the authorities cited by Defendant in Error, would be of little assistance to the Court. Few, if any, of them are in point here, and the facts revealed by a full reading of the cases show in most if not all these cases, that the physical facts tended to prove negligence. For instance, in Brown v. La. & C. R. Co., 165 S. W., 1060, (Brief, p. 9), there was a broken rail, and inspection and standard equipment only were shown, while a flaw and fresh break were shown to exist; in Albion Lumber Co., v. De Nobra, 72 Fed., 739, (Brief, p. 3), the logging train was running at an excessive rate of speed; in the cases of Chaperon v. Portland General Electric Co., 67 Pac., 928, Abrams v. Seattle, 60 Wash., 356, and Sweeney v. Ewing, 228 U. S., 237, the agency causing injury is electricity, and evidence of proper inspection and due care is relied upon with no proof of an independent agency or control to account for the accident. Indeed this may be said of practically all the cases cited by Defendant in Error.

The attempt of counsel for Defendant in Error to infer negligence from the facts shown to exist goes far beyond the rules applicable to presumption and enters the realm of *supposition*.

On p. 33 of the Brief, under the head of "Review of the Evidence," attention is drawn to the fact that the Railway Company did not prove or attempt to

prove any motive for anyone going upon the right-of-way and wantonly causing the derailment of a train. It may be "scarcely conceivable" in counsel's mind that anyone would do such an atrocious thing, but, nevertheless, human experience is full of just such atrocious deeds on the part of persons of evil intent, and it is useless to argue that because no motive is shown that the fact should not be inferred from the physical conditions shown to have existed. There is no other inference which can reasonably be drawn from the facts shown by the evidence.

The attempt to make a jury question of the explanation of derailment offered by Plaintiff in Error is based wholly upon supposition, and not upon any inference from facts which the law of evidence permits.

"*Inference* as respects evidence, says the Alabama Court, is a very different matter from supposition. The former is a deduction from proven facts; while the latter requires no such premise for its jurisdiction. Courts and juries, in dealing with the inquiry, whether a party has discharged his burden of proof, cannot pronounce upon *mere supposition* that the burden has been met.

"Supposition has no legitimate sphere or habitation in judicial determination."

Miller-Brent Lbr. Co. vs. Douglas, 167 Ala., 286.

PRESUMPTIONS DO NOT SUPPLY THE PLACE OF FACTS, BUT MUST GIVE WAY WHEN THE FACTS APPEAR.

"In general, presumptions can stand only whilst they are compatible with the conduct of those to

whom it may be sought to apply them, and must still more give place when in conflict with clear, distinct and convincing proof."

Fresh vs. Gilson, 16 Peters, 327.

"Presumptions, from evidence given in a cause, of the existence of particular facts, are in many, if not all, cases, mixed questions of law and fact. If the evidence be irrelevant to the fact insisted upon, or be such as cannot fairly warrant a jury in presuming it, the Court is so far from being bound to instruct them that they are at liberty to presume it, that it would err in giving such instruction. For why give it when it is manifest that if the jury should find their verdict upon the fact so deduced, it would be the duty of the Court to set it aside and to direct a re-trial of the cause?"

U. S. Bank vs. Corcoran, 2 Peters, 121, 133.

"Presumptions are indulged to supply the place of facts; they are never allowed against ascertained and established facts. *When these appear, presumptions disappear.*" (Italics are ours).

Lincoln vs. French, 105 U. S., 614, 617.

"Presumptions are only indulged to supply the absence of evidence or averments respecting the facts presumed. They have no place for consideration when the evidence is disclosed or the averment is made."

Galpin vs. Page, 85 U. S., 351, 366.

"The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on *remote inferences*.

"A presumption which the jury is to make *is not a circumstance in proof; and it is not*, therefore, a legitimate foundation for a presumption." (Italics are ours).

U. S. vs. Ross (Civil), 92 U. S., 281, 284.

"The presumption of law that stockholders are deemed to be citizens of the state of the corporation's domicile must give way to the actual fact proved, that complainant is a citizen of a different state from the corporation."

Doctor vs. Harrington, 196 U. S., 579, 587.

See also:

Fetter on Carriers of Passengers, Vol. 2, Sec. 494,

where the true rule is stated.

Also:

Norfolk Ry. Co. vs. Marshall, 20 S. E., 823;
Wabash R. Co. vs. Koenigsham, 13 Ill. Appeal,
505;

Sawyer vs. Railroad Co., 37 Mo., 241;

Perry vs. Malarin, 40 Pac., 489;

Louisville Ry. Co. vs. Jones, 9 N. E., 476;

Pittsburg R. Co. vs. Williams, 74 Ind., 462;

Perishing vs. Ry. Co., 32 N. W., 488;

Tuttle vs. Ry. Co., 48 Ia., 236;

Eldridge vs. Ry. Co., 20 N. W., 151;

Hazele vs. Ry. Co., 76 Ill., 501.

Central Ry. Co. vs. Mote, 48 S. E., 136;

Canadian Ry. Co. vs. Senske, 201 Fed., 637,
(C. C. A.);

Railway Co. vs. Hope, 54 So., 369.

CREDIBILITY OF WITNESSES.

The evidence of persons in the employ of the Railway Company, in the absence of anything to discredit or contradict such evidence, cannot be arbitrarily disregarded. The employment or business of a witness affords no reason why this evidence should be arbitrarily or without reason disregarded.

Brunswick R. Co. vs. Wiggins (Ga.), 39 S. E., 551;
Railroad Co. vs. Beason (Ga.), 37 S. E., 863;
Florida Central & P. R. Co. vs. Rudolph, 38 S. E., 328;
Railroad Co. vs. Wall (Ga.), 7 S. E., 639.

In the case last cited the Supreme Court of Georgia lays down the rule, which has been consistently followed in that state, in the following language:

“The law, by raising a presumption of negligence and requiring the company to rebut that presumption by showing that all ordinary and reasonable diligence was observed, means to accept such explanation as, according to the manner of conducting business, it is possible to make. It is generally out of the power of the company to show this diligence, except by its employes. The law, therefore, certainly means to receive their evidence as the evidence of other witnesses is received, subject to be weighed, and, if there be anything against it, discredited, but to be credited and respected if there be nothing against it. There is no other way to carry out the scheme of the law, which is to require the railroad company to show the observance of all ordinary and reasonable diligence. To arbitrarily reject the explanation because it comes from employes is to cut off the company from defense altogether; it is to stand on the presumption, and treat it as impossible to make defense. That is not the scheme of the law. In this case the defense was complete, and we think the jury found contrary to evidence and contrary to law. There is no law that entitles a jury not to recognize due proof when it is made.”

It was the duty of the Court to instruct the jury to return a verdict for the defendant at the close of the trial, because the evidence in explanation of the accident is undisputed, or, at least, is so clearly pre-

ponderant and of such a conclusive character that the Court would be bound, and was bound, in the exercise of a sound judicial discretion, to set aside the verdict in opposition to this evidence.

Canadian N. R. Co. vs. Senske, 201 Fed., 637.

Opinion of Judge Sanborn on p. 644.

Southern Pac. Co. vs. Poole, 160 U. S., 438, 440;

Union Pac. Ry. Co. vs. McDonald, 152 U. S., 262, 283;

Delaware & L. W. Ry. Co. vs. Converse, 139 U. S., 469;

Patillo vs. Allen West Com. Co., 131 Fed., 680; 686;

Chicago Gt. W. Ry. Co. vs. Roddy, 131 Fed., 712;

Woodward vs. C., M. & St. P. Ry. Co., 145 Fed. 577.

While apparent conflict exists in decided cases as to the force of the presumption of negligence here under consideration, we think a careful reading of these cases will show that there is nothing really out of harmony with our contention here, but that in most, if not quite all the well considered cases, there was evidence in the nature of physical facts or testimony which support the presumption, and thus make a case for the jury. Where no such evidence exists nothing remains but for the Court to hold, as a matter of law, that defendant's evidence is controlling, and that there is no issue for the jury, or, if in case of doubt, the cause is submitted to the jury, and a verdict is found against the defendant, it is the duty of the Court to set aside the verdict, because it is not sup-

ported by a legal preponderance of the evidence. This Record, it appears to us, clearly presents a case where no issue of fact is involved, and it is the duty of the Court to dismiss the cause.

Respectfully submitted,

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United States Circuit Court of Appeals
For the Ninth Circuit.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a corporation,

Plaintiff in Error,
vs.

SARAH J. IRVING,

Defendant in Error.

PETITION FOR REHEARING.

Upon Appeal from the United States District Court
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Filed

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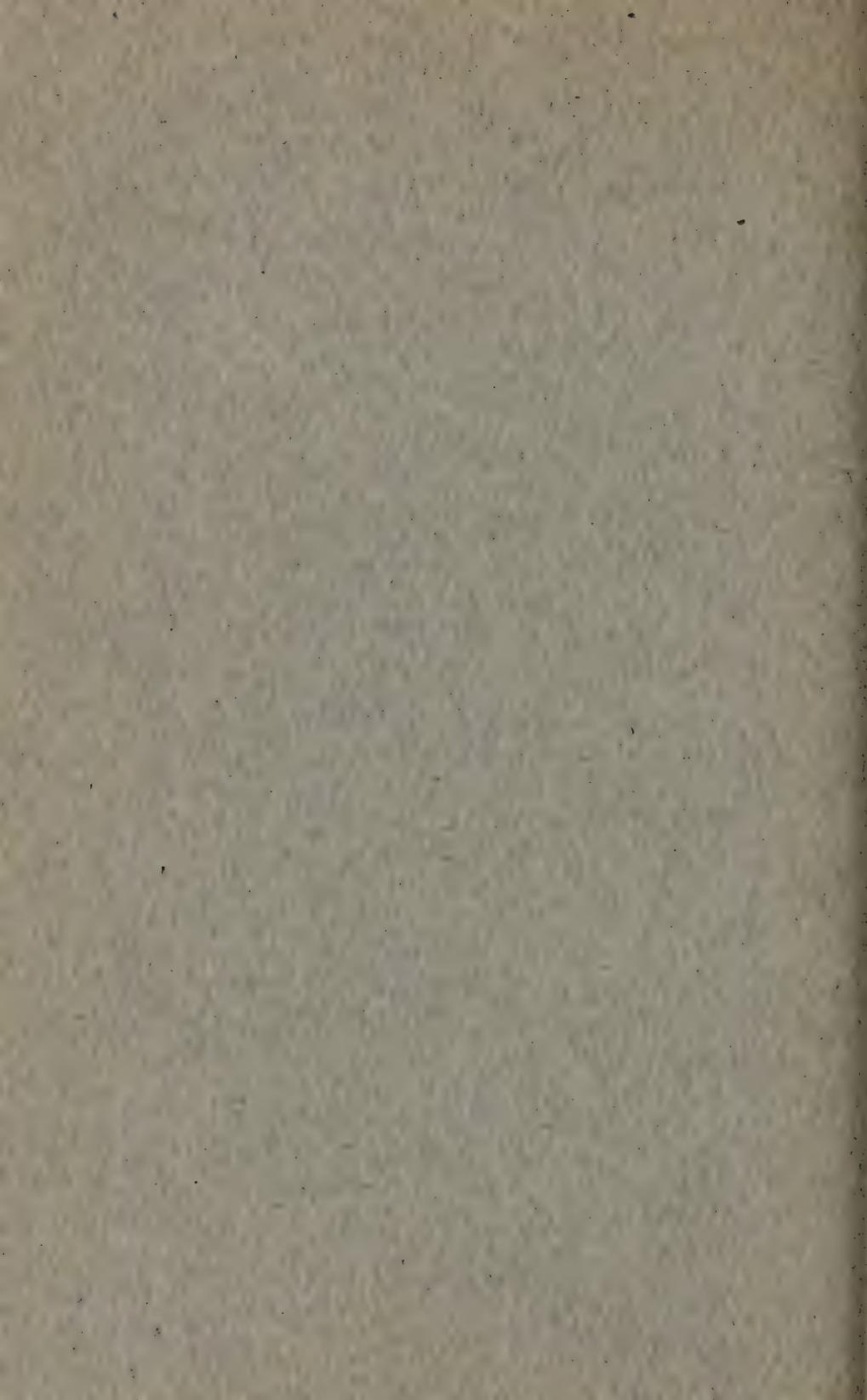
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PETITION FOR REHEARING.

We have made a determined effort to bring ourselves to the belief that the opinion rendered in this case announces the correct rule of law. But after reading it many times, and analyzing the authorities therein cited, we are thoroughly convinced that the law has not been properly stated. Authorities of the most radical type are used to buttress this decision. Thompson, for example, in language more picturesque than temperate, "takes a fling" at the railroads and denounces a judge who would refuse to submit such a case to the jury.

It is important that railroads should not be hampered by unreasonable restraints, nor by any pre-determination as to liability in the event of an accident. Trains are operated by human individuals, who are chargeable with a high degree of care, but no more. Derailments are exceptional, but possible. If this decision be permitted to stand, the railway company becomes a guarantor, and the fundamental principles of law, requiring the plaintiff to prove his case by a preponderance of the evidence, and that the defendant's liability be not based upon conjecture, will be subverted. Trains must be run with regularity and on schedule time; railway employes must do whatever is reasonably necessary for the safety of passengers. But making due allowance

for these considerations, the same degree of duty applies to them as to other people, namely, to exercise a degree of care commensurate with the situation; and that is all.

As has been made clear in our briefs, the plaintiff's right to invoke the *res ipso loquitur* rule is not questioned; but rather its erroneous application. Much confusion in this regard exists. Any decision not in accord with appellant's contention cannot possibly be consistent with settled principles. When all the cases are considered, no conflict will be found. The application of this rule is peculiarly one which must depend upon the particular facts of each case. In nearly every instance where an apparently contrary doctrine has been adopted there has been some evidence introduced affirmatively or by necessary implication, in addition to the bare legal presumption. If such has not been the case, the defendant's evidence has not been sufficiently strong to balance the presumption.

A presumption of *law* is a rule of law that a particular inference shall be drawn from a particular circumstance.

A presumption of *fact* is a rule of law that a fact, otherwise doubtful, may be inferred from a fact which is proved.

A presumption of fact or a natural presumption is one which, when a fact is proved therefrom, by reason of the connection founded on inference, the existence of another fact is directly inferred.

The presumption of law is merely the legal or artificial presumption, where the existence of one fact is not direct evidence of the existence of the other, but the one fact existing, the law raises an artificial presumption of the existence of the other.

- Can there be any doubt about *res ipso loquitur* being a mere presumption of law, a legal, artificial, fictitious, arbitrary presumption, not based on any fact proven? And that such presumption is adopted to facilitate procedure because the defendant could better explain the accident? Courts which have said it is a presumption of fact, and that it is evidence, have not considered the real character of this presumption. Admittedly the inference is not based on any proven fact or evidence. Then why attach to the presumption the added significance by giving it evidentiary character, and probative force, when all know and must admit that this rule was never intended to be other than a rule of procedure? To say that it is evidence, argues in favor of a misconception of the primary meaning of this presumption.

Derailments have and do occur through no fault

or neglect of the railroads, but because they are of rare occurrence, and do not ordinarily happen except through negligence, and because all the facts are supposed to be, and may be, within the knowledge of the railway company, the law says it will be better to assume for the time being, (and until explained), that there was negligence. It was never intended that such was to be assumed as a fact,—as a verity. A demurrer admits the truthfulness of the allegations in a complaint, not as being in reality true, but for the purpose of argument, for testing the sufficiency of the complaint. It is a mere rule of procedure.

A presumption cannot contradict facts or overcome facts proved. Presumptions of law have no place for consideration when the evidence is disclosed. When, therefore, the record states the evidence, it will be understood to speak the truth on that point, it will not be presumed that there was other or different evidence respecting the facts relating to the derailment or that the facts were otherwise than as related.

If, for example, a judgment be rendered against a defendant by a court of general jurisdiction, the law presumes it valid and that jurisdiction of the person was duly obtained. But such a presumption is indulged only to supply the absence of evidence

or averments respecting the facts presumed. When it appears that the defendant was without the jurisdiction and never appeared, the presumption of jurisdiction over his person ceases, and the burden is upon the person who is enforcing the judgment to prove by *affirmative evidence* that the court did have jurisdiction over the person of the judgment debtor.

Galpin vs. Page, 18 Wall., 350:

"But the presumption, which the law implies in support of the judgments of superior courts of general jurisdiction, only arise with respect to jurisdictional facts concerning which the record is silent. Presumptions are only indulged to supply the absence of evidence or averments respecting the facts presumed. They have no place for consideration when the evidence is disclosed or the averment is made. When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred.

* * * * *

"Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was at the time of the alleged service, without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the

party who invokes the benefit or protection of the judgment or decree."

"Presumptions can only stand when they are compatible with the conduct of those to whom it may be sought to apply them; and still more must give place when in conflict with clear, distinct and convincing proof."

Whitaker vs. Morrison, 47 Am. Dec., 627.
Fresh vs. Gilson, 16 Pet., 331.

Presumptions of law derive their force from jurisprudence and not from logic, and such presumptions are purely arbitrary in their application.

The section of Wigmore, 2509, cited in the court's opinion, has nothing to do with this question. It merely states the general rule as to when the *res ipso loquitur* rule should be applied. Wigmore Sec. 2487 (e) is pertinent to the present inquiry, and states the correct rule. *Menomonie, etc. vs. R. Co.*, 65 N. W., 176, cited in the note to the last mentioned section of Wigmore, was cited in our Brief, and is a leading case.

Most certainly, when considered in the light of its primary meaning and purpose, a legal presumption is not entitled to much significance, cannot appropriate to itself probative force or evidentiary character, and it is consequently easily removed. Its function was to settle the matter only provisionally. It has performed its duty when it compelled the defendant

to come forward with some evidence. When the defendant offered rebuttal evidence, the presumption vanished, if the evidence satisfies the requirement of some evidence. The evidence in this case went even further and not only rebutted the presumption, but raised a counter-presumption of due care on its part.

Respondent contended, and this decision holds, that defendant must dispel every possible act of negligence.

Such an argument in fact admits that the defendant's evidence herein satisfactorily explained the plaintiff's presumption, but surmises that the wreck might have been caused through some other act of negligence on the part of the defendant. Such other possible act of negligence is left purely to conjecture. The proving of one cause of the accident, for which the defendant is not liable, necessarily negatives the existence of any other cause. This court has never lent its approval to holding one liable on a conjecture of possible negligence. While counsel for the respondent argued that the defendant failed to overthrow the presumption of negligence because there might have been other particulars, in which the defendant might have been negligent, he did not point out to the court in what respect such negligence could have occurred. The only rule that has

ever been adopted in any case of this sort is that the arbitrary, fictitious, legal presumption is overcome when the defendant has proven the absence of negligence in those particulars as to which negligence might reasonably exist under the circumstances.

Smith vs. Northern Pacific Railroad Co., 53 N. W., 173 (N. Dak.).

"We have examined many cases, but as each case depends upon its own peculiar facts, it would be useless to cite them. We will, however, refer to one which is confidently relied on as an authority. It is *Greenfield vs. Railroad Co.*, 49 N. W., 95, an Iowa case. The opinion is not satisfactory in its reasoning. The chief point running through the opinion is that defendant failed to overthrow the presumption of negligence, because there might have been other particulars in which defendant might have been negligent, aside from defects in the engine or its construction, and aside from carelessness in operating it. In what such negligence could consist, or how it could have been instrumental in causing the fire, was not pointed out by the court. We do not approve of holding one liable on a conjecture of possible negligence. The better rule is that the arbitrary presumption is overcome when the defendant has disproved negligence in those particulars as to which negligence might reasonably exist under the circumstances."

Vorbrich vs. Geuter, etc., Mfg. Co., 71 N. W., 434, (Wis.).

In this case, Justice Marshall deemed the point involved herein of sufficient importance to write a

separate opinion. In it he shows how the cases apparently in conflict, are in reality harmonious, and among other things says.

"In the recent case of Menomonie River Sash & Door Co. vs. Milwaukee, etc., Railway Co., 65 N. W., 176, this court, in an exhaustive opinion, by Mr. Justice Pinney, went over the whole ground, collating and commenting on substantially all the important adjudications in this court, and re-affirmed, without exception, the doctrine that where negligence arises as a presumption of fact from the happening of an accident with machinery, not a mere inference to be drawn by the jury, but a presumption so convincing and persuasive that, unexplained or unrebutted, it *prima facie* establishes the alleged negligence, such presumption is, nevertheless, overcome by conclusive proof that the machine was free from discoverable defect, so as to take the question in that regard from the jury. * * *

"On the occasion in question, plaintiff claimed that the chain failed to respond to a release of the lever. The proof was that no defect existed in the apparatus that could be discovered or pointed out, and that the machine responded promptly to the manipulation of the lever before and after the accident. Counsel for plaintiff contended that the jury was warranted in finding that the failure of the machine to operate as usual at the time of the injury was owing to some defect therein. The court held to the contrary, and that a finding on counsel's contention could be based on mere surmise and conjecture that there was negligence somewhere, that if that were permissible some of the fundamental principles of the law of negligence would be done away with. That where an employe seeks compensation from a master for injuries received in the latter's employment, he must

trace it to some fault of the master, to some distinct failure of duty. * * *

"The foregoing sufficiently shows the substantial harmony existing to the effect that while, in a class of cases mentioned, an accident may be of such a character as to evidence negligence, and the inference in that regard may be so strong as to amount to a presumption of fact, not open to consideration by a jury, unless explained or rebutted, so as to throw doubt on the question, yet, when such inference or presumption arises from physical facts alone, and points to insufficiency in the construction or repair of machinery as the producing cause of the accident, conclusive proof that such machinery was free from all discoverable defects will wholly overcome it, and leave no legitimate basis for a finding of defectiveness which the owner ought to have discovered, and, reasonably, to have apprehended a personal injury might probably occur to some person whose personal safety ordinary care required him to guard. The principle here discussed we deem definitely established, as are substantially all principles pertaining to the law of negligence, the same as in any other branch of the law, civil or criminal."

The foregoing cases were cited in our former Brief, but they are leading cases, and referred to in most of the decisions on this point. We have referred to them herein in order to call the court's especial attention to this particular point, which we feel this court, in its opinion, has not duly considered. To carry the presumption to the extent of holding the defendant liable because of some presumed possible act of negligence, which is only in the realm of speculation, and which the fertile imagination of as-

tute counsel could not even point out to the court, is certainly subversive of the venerable and ancient landmarks of negligence law.

Nor can it be said that the case should have been submitted to the jury to pass upon the credibility of the witnesses. In the absence of any impeaching testimony, the witnesses of the defendant, even though in the employ of the defendant, are entitled to be believed.

Savage vs. Rhode Island Co., 67 Atl., 633 (R. I.), at 637:

“It is to be noted, that in all of the above cases cited, the presumption contended for does not amount to evidence, so as to warrant a case to be sent to a jury as upon a conflict of testimony, where there is no other conflict than that which arises between the mere presumption of law, on the one side, and the positive, direct, uncontradicted, and unimpeached testimony on the other; nor is it suggested in any of these cases that testimony of the character suggested above, even when given by employes of the defendant corporation, is so tainted with interest by reason of their employment as that it could be rejected by the jury, if it be fair, reasonable, and consistent in and of itself. We are satisfied that the plaintiff has failed to prove that the defendant was guilty of negligence.”

We would urge that the court again read this Savage case, also, in connection with the foregoing point, concerning this being a pure presumption of law and not one of fact.

See also, regarding the testimony of defendant's witnesses, which has not been rebutted, impeached, qualified, or in anywise limited,

Daly vs. Chicago, M. & St. P. Ry. Co., 45 N. W., 607, (Minn.).

Smith vs. Northern Pacific Ry. Co., 53 N. W. 173, *supra*.

Generally, the testimony of the defendant in cases of this sort is expert evidence, not based upon sufficiently broad hypotheses, or, the evidence is bereft of that certainty which is essential to holding the defendant's evidence to be conclusive as a matter of law, on the issues of a particular case. As, for example, in *Volkmar vs. Ry. Co.*, 31 N. E., 870, (N. Y.). A piece of iron fell from an elevated railroad injuring a person driving underneath the track. The track inspector testified that he performed his duties to the best of his ability. The court held that such testimony was a mere conclusion, and was not sufficiently strong to overcome the legal presumption. Compare such testimony with that introduced by the defendant in this case. It would serve no purpose to refer to that testimony in detail in this Petition. The person who had to do with the maintenance and repair of the track, testified regarding the ultimate facts and with a high degree of minuteness concerning the inspection and care of all the instrumentalities. In addition thereto, the bolts, rail, etc., were

introduced in evidence, with their silent, irrebuttable evidence that they could not have been in their present perfect condition had the derailment occurred through causes other than that which must be inferred from the defendant's explanation. In this case we do not have to deal with inconclusive, expert testimony, applied to a complicated statement of facts. Here we have the direct testimony of competent witnesses relating to simple physical facts, naturally open to satisfactory and accurate observation. There is no complicated mechanism involved.

Furthermore, in view of the declared policy of this state, as announced in the decisions of the supreme court, cited in our former Brief, the defendant had a right to reasonably expect that the rules therein adopted would be followed by the Federal Court. In the Washington cases, the leading authorities in support of defendant's contention, including Wigmore, are relied upon.

We respectfully submit that from the facts proven in this case, the court should not draw the legal conclusion set out in the opinion filed; that the court has not given due consideration to the underlying reasons for the application of the doctrine of *res ipso loquitur*, and that if the opinion and judgment are permitted to stand, grave injustice will result, not alone in this case, but in all cases of accidental in-

jury to passengers upon railway trains. The added burden to the carriers of passengers, and indirectly to the public through increased expense of operation, will be great. The courts have not intended to make the carrier an insurer of absolute safety, but the effect of this opinion is to do just that.

So important do we deem this matter to be that we earnestly petition the court to grant a rehearing and reargument of this case, in order that the law and the facts may again be presented. We confidently believe that such presentation would convince the court of its error.

Respectfully submitted,

GEO. W. KORTE,

Seattle, Wash.,

CULLEN, LEE & MATTHEWS,

Spokane, Wash.

Attorneys for Appellant.

United States
Circuit Court of Appeals
For the Ninth Circuit.

WM. H. MOORE, Jr., Trustee in Bankruptey of the Estate of
BERLIN DYE WORKS AND LAUNDRY COMPANY, a
Corporation, Bankrupt,

Appellant,
vs.

C. K. DOUGLAS,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the
Southern District of California, Southern Division.

Filed

OCT 19 1916

F. D. Munckson

No. 2665

United States
Circuit Court of Appeals
For the Ninth Circuit.

WM. H. MOORE, Jr., Trustee in Bankruptcy of the Estate of
BERLIN DYE WORKS AND LAUNDRY COMPANY, a
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Appellant,

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Appellee.

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Upon Appeal from the United States District Court for the
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

For Appellant:

Messrs. W. T. CRAIG, CARROLL ALLEN,
BENJ. E. PAGE, and DAVE F. SMITH,
Board of Trade Rooms, 725 Higgins
Building, Los Angeles, California.

For Appellee:

E. B. DRAKE, Esq., 1308-9-10 Washington
Building, Los Angeles, California. [3*]

*In the District Court of the United States, Southern
District of California, Southern Division.*

IN BANKRUPTCY—No. 1367.

In the Matter of BERLIN DYE WORKS & LAUN-
DRY COMPANY, a Corporation,
Bankrupt,

C. K. DOUGLAS,

Petitioner,

vs.

WM. H. MOORE, Jr., Trustee in Bankruptcy of the
Estate of Berlin Dye Works & Laundry Com-
pany, a Corporation, Bankrupt,
Respondent.

Citation on Appeal.

United States of America,—ss.

The President of the United States to C. K. Douglas,
Greeting:

You are hereby cited and admonished to appear in
the United States Circuit Court of Appeals for the

*Page-number appearing at foot of page of certified Transcript of Record.

Ninth Circuit in the City of San Francisco, State of California, on the 9th day of August, 1915, pursuant to the appeal duly obtained and filed in the Clerk's office of the District Court of the United States, for the Southern District of California, Southern Division, wherein you, as claimant and petitioner are appellee, and Wm. H. Moore, Jr., Trustee in Bankruptcy of the estate of Berlin Dye Works & Laundry Company, a corporation, bankrupt, is the appellant, to show cause, if any there be, why the orders, and each of them, in [4] said appeal mentioned should not be reversed and corrected, and why speedy justice should not be done to the parties in that behalf, and to do and receive what may appertain to justice to be done in the premises.

WITNESS, the Honorable OSCAR A. TRIPPET, United States District Judge for the Southern District of California, on the 12th day of July, in the year of our Lord one thousand nine Hundred and fifteen.

OSCAR A. TRIPPET,
District Judge. [5]

[Endorsed]: Original. No. 1367. In United States District Court, Southern District of California, Southern Division. In the Matter of Berlin Dye Works & Laundry Company, a Corporation, Bankrupt, C. K. Douglas, Petitioner, vs. Wm. H. Moore, Jr., Respondent. Citation on Appeal. Filed Jul. 13, 1915, at 25 min. past 4 o'clock, P. M. Wm. M. Van Dyke, Clerk. Murray C. White, Deputy.

Service of the within Citation on Appeal is hereby

admitted this 13th day of July, 1915, A. M. E. B. Drake, Attorney for C. K. Douglas, Petitioner. [6]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

IN BANKRUPTCY—No. 1367.

In the Matter of BERLIN DYE WORKS & LAUN-
DRY COMPANY, a Corporation,

Bankrupt. [7]

*In the District Court of the United States, Southern
District of California, Southern Division.*

In the Matter of BERLIN DYE WORKS & LAUN-
DRY COMPANY, a Corporation,

Bankrupt.

[Proof of Unsecured Debt Due C. K. Douglas.]

At Los Angeles, in said District of Southern California, on the 13th day of February, A. D. 1914, came C. K. Douglas, in the County of Los Angeles, in said District of California, and made oath and says that the Berlin Dye Works and Laundry Company, the corporation against which a petition for adjudication of bankruptcy has been filed, and which adjudication has been had, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of Ten Thousand Five Hundred Thirteen and 32/100 Dollars (\$10,513.32); that the consideration of said debt is as follows, to wit:

A certain judgment rendered in favor of this de-

ponent against said Berlin Dye Works and Laundry Company, a corporation, in the Superior Court of the State of California, in and for the County of Los Angeles, styled, C. K. Douglas, plaintiff, vs. Berlin Dye Works and Laundry Company, a corporation, on July 11th, 1913, for the sum of Ten Thousand Dollars (\$10,000.00) and costs therein taxed at Ninety-seven and 10/100 Dollars (\$97.10), and all of which appears by duly certified copy of said judgment hereto attached and made a part hereof as Exhibit "A"; that no part of said debt has been paid; that [8] there are no setoffs or counterclaims to or against the same, and that deponent has not, nor has any person by his order, or to the knowledge or belief of said deponent, for his use, had or received any manner of security for said debt whatsoever.

C. K. DOUGLAS,
Creditor.

Subscribed and sworn to before me this 13th day of February, 1914.

[Seal] MORA BARNES,
Notary Public in and for the County of Los Angeles,
State of California. [9]

*In the Superior Court of the State of California, in
and for the County of Los Angeles.*

C. K. DOUGLAS,
Plaintiff,

vs.

BERLIN DYE WORKS & LAUNDRY COMPANY, a Corporation,
Defendant.

EXHIBIT "A."

Judgment on Verdict in Open Court.

This action came on regularly for trial on the 10th day of July, 1913. The said parties appeared by their attorneys, E. B. Drake, Esq., counsel for plaintiff, and Hickcox & Crenshaw for defendant. A jury of 12 persons was regularly *impaneled* and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into court, and being called answered to their names, and duly rendered their verdict in writing in favor of plaintiff in words and figures as follows, to wit:

Title of Court and Cause: "We the jury in the above-entitled action, find for the plaintiff and assess the damages at the sum of \$10,000.00, this 11th day of July, 1913.

F. E. WILSON,
Foreman."

WHEREFORE, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said plaintiff have and recover from said defendant damages in the sum of \$10,000.00, together with his costs and disbursements incurred in this action, amounting to the sum of 97.10 dollars.

[10]

(In pencil: O.K.—W. J. Wilson.)

Clerk's Office of the Superior Court, in and for the County of Los Angeles, State of California,—ss.

I, the undersigned, clerk of said court, do hereby certify the foregoing to be a full, true and correct copy of the Judgment entered in the above-entitled action.

Attest my hand and the seal of said Superior Court,
this 13 day of Feb. 1914.

H. J. LELANDE,

Clerk.

[Seal]

By F. J. Adams,

Deputy.

[Endorsed]: No. 97,386. Superior Court, County of Los Angeles. Department No. 3. C. K. Douglas, Plaintiff, vs. Berlin Dye Works and Laundry Co., a Corp., Defendant. Judgment on Verdict. Filed Jul. 11, 1913. H. J. Lelande, Clerk. By C A. Cattern, Deputy. Docketed Jul. 12, 1913. Entered Jul. 12, 1913, Book 233, Page 244. By G. E. Ross, Deputy Clerk.

[Endorsed]: Original. No. 1367. In the District Court of the United States, Southern District of California, Southern Division. In the Matter of Berlin Dye Works and Laundry Company, a Corporation, Bankrupt. Proof of unsecured Debt. Filed Feb. 14, 1914, at 30 Min. Past 10 o'clock A. M. Lynn Helm, Referee. C. Meade, Clerk. E. B. Drake, Attorney at Law, 1308-9-10, Washington Building, Main 3073, F. 3815, Los Angeles, Cal. [11]

*In the District Court of the United States, Southern
District of California, Southern Division.*

IN BANKRUPTCY—No. 1367.

In the Matter of BERLIN DYE WORKS & LAUN-
DRY CO., a Corporation,

Bankrupt.

Objection to Claim of C. K. Douglas for \$10,513.32.

Comes now Wm. H. Moore, Jr., Trustee in Bank-
ruptcy of the above-named bankrupt corporation,
and objects to the claim of C. K. Douglas, filed herein
for the sum of \$10,513.32, on the following grounds,
to wit:

I.

That said claimant is not entitled to prove a claim
against the above-named bankrupt estate.

II.

That the judgment, an abstract of which, marked
Exhibit "A," is attached to claimant's proof of debt
on file herein, is not a final judgment, same having
been appealed by the Berlin Dye Works & Laundry
Company, a corporation, now bankrupt, from the Su-
perior Court of the State of California, in and for
the County of Los Angeles, to the Supreme Court of
the State of California and not having yet been de-
cided by said court.

III.

That claimant's proof of debt filed herein for \$10,-
513.32, according to the judgment upon which it is
based, an abstract of which, marked Exhibit "A," is

Wm. H. Moore, Jr.

attached to claimant's proof of debt, should be only \$10,097.10. [12]

WHEREFORE, said Trustee prays that the claim of C. K. Douglas, filed herein for the sum of \$10,513.32, be disallowed and expunged from the records.

WM. H. MOORE, Jr.,

Trustee.

W. T. CRAIG & CARROLL ALLEN and

BENJ. E. PAGE and DAVE F. SMITH,

Attorneys for Trustee.

United States of America,

Southern District of California,

Southern Division,

County of Los Angeles,—ss.

Wm. H. Moore, Jr., being duly sworn, says: That he is Trustee in the foregoing entitled matter; that he has read the foregoing Objection to Claim of C. K. Douglas and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief and as to those matters that he believes it to be true.

WM. H. MOORE, Jr.

Subscribed and sworn to before me this 23d day of June, 1914.

[Seal]

LOIS DUNLAP,

Notary Public in and for the County of Los Angeles,
State of California.

[Notarial Seal.]

[Endorsed]: Orig. No. 1367. In United States
District Court, Southern District of California,

Southern Division. In the Matter of Berlin Dye Works & Laundry Co., a Corporation, Bankrupt. Objection to Claim of C. K. Douglas for \$10,513.32. Received Copy of the Within Objection This 23 Day of June, 1914. E. B. Drake, Attorney for C. K. Douglas. Benj. E. Page & Dave F. Smith, W. T. Craig and Carroll Allen, Board of Trade Rooms, 725 Higgins Building. Telephones: Home 10112, Sunset Main 4622, Los Angeles, Cal., Attorneys for Trustee. filed Jun. 23, 1914, at —— Min. Past 4 o'clock P. M. Lynn Helm, Referee. C. Meade, Clerk. [13]

*In the District Court of the United States, Southern
District of California, Southern Division.*

In the Matter of BERLIN DYE WORKS AND
LAUNDRY COMPANY, a Corporation,
Bankrupt.

Supplemental Affidavit of E. B. Drake.

State of California,
County of Los Angeles,—ss.

The affiant, being first duly sworn, deposes and says:

That he is now, and at all times mentioned has been, admitted to practice law in all courts of record in the State of California, and is now and was at all times mentioned herein the attorney for the judgment plaintiff, C. K. Douglas.

That the judgment mentioned in the affidavit of C. K. Douglas filed as a basis of proof of his unsecured debt herein, and which judgment is Exhibit "A" to the said Douglas's affidavit, has now become

final in this, that appeal was had from said judgment by the Berlin Dye Works and Laundry Company, a Corporation, Bankrupt, and the Supreme Court of this state, in said appeal L. A. No. 3791, affirmed the said judgment on December 17th, 1914, and that the same is now final.

Further deponent sayeth not.

E. B. DRAKE.

Subscribed and sworn to before me this 18th day of January, 1915.

[Seal] MORA BARNES,
Notary Public in and for the County of Los Angeles,
State of California. [14]

[Endorsed]: Original No. 1367. In the District Court of the United States, Southern District of California, Southern Division. In the Matter of Berlin Dye Works and Laundry Company, a Corporation, Bankrupt. Supplemental Affidavit of E. B. Drake. Filed Jan. 18, 1915 at — min. past 3 o'clock P. M. Lynn Helm, Referee. C. Meade, Clerk. E. B. Drake, Attorney at Law, 1308-9-10 Washington Building. Main 3073 F 3815. Los Angeles, Cal. [15]

In the District Court of the United States of the Southern District of California, Southern Division.

IN BANKRUPTCY—No. 1367.

In the Matter of BERLIN DUE WORKS & LAUNDRY CO., a Corporation,
Bankrupt.

[Report of Referee in Bankruptcy.]

To the Honorable, the Judges of the United States District Court, Southern District of California.

I, Lynn Helm, Referee in Bankruptcy, in charge of the above-entitled proceedings respectfully represents, that in the course of said proceedings on the 6th day of April, 1915, an order was entered disallowing the claim of C. K. Douglas filed in said proceedings, which order is in words and figures as follows:

"In the District Court of the United States for the Southern District of California, Southern Division.

IN BANKRUPTCY—No. 1367.

In the Matter of BERLIN DYE WORKS & LAUNDRY CO., a Corporation,

Bankrupt.

**Findings of Fact and Conclusions of Law on Claim
of C. K. Douglas and Order Disallowing Said
Claim.**

C. K. Douglas having filed a claim against the above-named bankrupt estate on February 14th, 1914, and objections having been made to the allowance of the claim by Wm. H. Moore, Jr., Trustee in Bankruptcy of the Berlin Dye Works & Laundry Company, a corporation, bankrupt, said claim and the objections thereto came on regularly for hearing before Lynn [16] Helm, referee before whom the above-named bankruptcy matter is now pending, on February 1st, 1915, at 2:00 P. M. of said day, claim-

ant, C. K. Douglas, being represented by E. B. Drake, Esquire, and the trustee being represented by W. T. Craig, Esquire, Carroll Allen, Esquire, Benjamin E. Page, Esquire, Dave F. Smith, Esquire and A. Henderson Stockton, Esquire. That at said hearing evidence was introduced on behalf of the claimant and the trustee herein, and after due consideration the referee finds the facts to be as follows, to wit:

I.

That a judgment was entered in favor of said claimant, C. K. Douglas, and against the Berlin Dye Works & Laundry Company, a corporation, said bankrupt, on July 11th, 1913, in the Superior Court of the State of California, in and for the County of Los Angeles, for the sum of \$10,000.00. That said judgment was recovered in an action theretofore commenced by said claimant, C. K. Douglas, against the bankrupt corporation to recover damages for personal injuries suffered by said C. K. Douglas by reason of the alleged negligence of the said Berlin Dye Works & Laundry Company, a corporation, bankrupt.

II.

That after the said judgment was entered, and on September 10, 1913, the Berlin Dye Works & Laundry Company, a corporation, now bankrupt, appealed from said judgment to the Supreme Court of the State of California, executing a cost bond in the sum of \$300.00; but did not execute a supersedeas bond.

III.

That on September 15th, 1913, an involuntary peti-

tion in bankruptcy was filed against said Berlin Dye Works & Laundry Company, a corporation, now bankrupt and on October 7, 1913, it was duly adjudged a bankrupt. [17]

IV.

That on February 14th, 1914, said C. K. Douglas filed a claim against the above-named bankrupt corporation, said claim being based upon an abstract of said judgment entered July 11, 1913, in the Superior Court of the State of California, in and for the County of Los Angeles.

V.

That on April 17th, 1914, a stipulation between the trustee and the claimant was filed in the Supreme Court of the State of California, and motion made in said Supreme Court to advance and submit the appeal in the case of C. K. Douglas against the Berlin Dye Works & Laundry Company, a corporation, and it was accordingly done.

VI.

That on April 21st, 1914, the claim of C. K. Douglas was presented to this Court for allowance and oral objections were made thereto at said time, upon the ground that said C. K. Douglas has no provable claim against the estate of said bankrupt and the dividend that day declared on all claims proved but not allowed was suspended. That on July 23, 1914, formal written objections were filed on behalf of the Trustee to the claim of C. K. Douglas, upon the grounds set forth in said written objections.

VII.

That on December 17th, 1914, the judgment of the

Superior Court of the State of California, in and for the County of Los Angeles, in favor of C. K. Douglas and against the Berlin Dye Works & Laundry Company, a corporation, now bankrupt, on appeal was duly affirmed by the Supreme Court of the State of California, and said judgment became final on January 16th, 1915. [18]

CONCLUSIONS OF LAW.

From the foregoing findings of fact the following conclusions of law are made by said Referee:

I.

That at the date of the filing of the petition and of the adjudication in bankruptcy herein the said judgment entered in the Superior Court of the State of California, in and for the County of Los Angeles, in favor of C. K. Douglas and against the Berlin Dye Works & Laundry Company, a corporation, now bankrupt, for \$10,000.00 was not final judgment, nor a fixed liability absolutely owing at said time.

II.

That the claim of C. K. Douglas is not a provable debt in bankruptcy against the estate of the Berlin Dye Works & Laundry Company, a corporation, bankrupt.

Now, therefore, in view of the foregoing findings of fact and conclusions of law.

IT IS ORDERED, ADJUDGED AND DECREED that the claim of C. K. Douglas filed herein on February 14, 1914, be disallowed and expunged from the files.

DATED: April 6, 1915.

LYNN HELM,
Referee in Bankruptcy."

That afterwards on the 16th day of April, 1915, C. K. Douglas, who filed said claim in said proceedings as a creditor, feeling aggrieved at said order filed a petition for review which was granted, which petition for review is hereto attached. The order set forth in said petition for review is not the order entered by me on the 6th day of April, 1915, disallowing and expunging from the files said claim of C. K. Douglas, but is only the concluding portion thereof, the order being as hereinbefore set forth. [19]

That a summary of the evidence on which said order was based is set forth in said order and in the opinion which I filed on making said order.

The reason for making said order was fully set forth in my opinion upon which said order was entered which opinion is in words and figures as follows: [20]

[Opinion of Referee] on Proof of Claim of C. K.
Douglas.]

*In the District Court of the United States, Southern
District of California, Southern Division.*

In the Matter of BERLIN DYE WORKS AND
LAUNDRY COMPANY, a Corporation,
Bankrupt.

E. B. DRAKE, Esq., Attorney for Claimant;
W. T. CRAIG, Esq., and CARROLL ALLEN,
Esq., Attorneys for Trustee;

HELM, Referee:

This is a proof of claim filed herein February 14th, 1914, by C. K. Douglas upon a judgment rendered

July 11th, 1913, in the Superior Court of the State of California, in and for the County of Los Angeles for the sum of Ten Thousand (10,000) Dollars damages recovered in an action brought by C. K. Douglas against the bankrupt corporation for personal injuries suffered by the claimant by reason of the alleged negligence of the bankrupt. After the rendition of this judgment on September 10th, 1913, the bankrupt appealed from said judgment to the Supreme Court of the State of California executing a cost bond in the sum of Three Hundred (300) Dollars; but did not execute a supersedeas bond as provided in the Code of Civil Procedure of the State of California, Section 942. On September 15th, 1913, an involuntary petition in bankruptcy was filed against the bankrupt and on the 7th day of October, 1913, it was duly adjudged a bankrupt. On April 17th, 1914, a stipulation between the Trustee herein and the bankrupt was filed and motion made to advance and submit the appeal in the case of C. K. Douglas [21] against the Berlin Dye Works in the Supreme Court, and it was accordingly done. April 21st, 1914, the claim of Douglas was presented for allowance but oral objection being made thereto the dividend that day declared on all claims proved, but not allowed, was suspended. On June 23, 1914, formal written objections were filed on behalf of the Trustee to the claim of Douglas on the ground that said claim was founded *in tort*, that it had not passed to final judgment at the time of the filing of the petition in bankruptcy, and was unliquidated, and was not a claim allowable in bankruptcy. On December

17th, 1914, the judgment of the Superior Court in favor of C. K. Douglas on appeal was duly affirmed by the Supreme Court of California and became final January 16th, 1915. The foregoing undisputed facts appeared upon the hearing of the said claim.

The only question here presented is whether the claim is one provable and allowable against the bankrupt's estate. Section 63a of the Bankruptcy Act provides that:

"Debts of the bankrupt which may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against *him* plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied.

* * * [22]

It is conceded that an unliquidated claim for damages for a personal injury which has not been reduced to judgment prior to the filing of the petition

in bankruptcy is not allowable in bankruptcy. *In re Yates*, 8 A. B. R. 70, 114 Fed. 365; *In re Ostrum*, 26 A. B. R. 273, 185 Fed. 988; *In re Wigmore*, 10 A. B. R. 661; 1 Remington on Bankruptcy, 2d ed., sec. 635.

On the other hand if a claim is reduced to judgment before the filing of the bankruptcy petition it may be proved as a judgment, though not, if not reduced to judgment until after the filing of the petition. *In re Crescent Lumber Company*, 19 A. B. R. 112, 154 Fed. 724.

Whether or not this claim was reduced to judgment and was a fixed liability absolutely owing at the time of the filing of the petition against this bankrupt must be determined by the State Law of California. *In re Talbot*, 7 A. B. R. 29, 110 Fed. 924; *In re Brown*, 21 A. B. R. 123, 164 Fed. 673.

The question whether or not a debt is provable turns upon its status at the time of the filing of the petition. In the case of *In re Neff*, A. B. R. 23, 157 Fed. 57, the Court said:

“The status of a claim must depend upon its provability at the time the bankrupt’s petition was filed. At that time it must come within the definition of section 63 of the Bankruptcy Act; it cannot be benefited by its status at a later date.”

In re Pettingell & Co., 14 A. B. R. 728, 137 Fed. 840, the Court said:

“The provability of a claim under the Bankruptcy Act of 1898 depends upon its status at the time the petition in bankruptcy is filed; if

then ‘provable’ within the definition of section 63 it may be proved; otherwise not.”

In *Slocum v. Soliday*, 25 A. B. R. 460, 183 Fed. 410, the Circuit Court of Appeals said: [23]

“In order that the claim may be proved it must have existed at or before the filing of the petition in bankruptcy which the adjudication follows.”

A judgment is defined in the Code of Civil Procedure of the State of California, section 577 as follows:

“A judgment is the final determination of the parties in an action or proceeding.”

“An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal is passed, unless the judgment is sooner satisfied.” (Code of Civil Procedure, sec. 1049.)

In the case of *Feeney v. Hinckley*, 134 Cal. 467, the Supreme Court of the State of California, Mr. Justice Henshaw delivering the opinion, said:

“An action will not lie upon a judgment until it has become final. Until that time has arrived, no cause of action upon the judgment has accrued. (*Hills v. Sherwood*, 33 Cal. 474, 479.) In *Gilmore v. American C. I. Co.*, 65 Cal. 63, it is said: ‘Until litigation on the merits is ended, there is no finality to the judgment, in the sense of a final determination of the rights of the parties, although it may have become final for the purpose of an appeal from it.’ And in the same

case (*Gilmore v. American C. I. Co.*, 67 Cal. 366), it is said that the judgment became final only, in the sense of the stipulation, when the time to move for a new trial and to appeal therefrom had elapsed, and no motion was made and no appeal taken. In *Harris v. Barnhart*, 97 Cal. 546, it is said: 'Until the time for an appeal has expired, if the judgment has not been sooner satisfied, the action is, under section 1049 of the Code of Civil Procedure, to be deemed as pending.' To like effect are [24] *Naftzger v. Gregg*, 99 Cal. 83, and *In re Blythe*, 99 Cal. 472, in which latter case it is held: 'That a judgment, in order to be admissible in evidence for the purpose of proving facts therein recited, must be a final judgment in the cause, and if the action in which the judgment is rendered is still pending, necessarily the judgment is not final.' And therein is quoted with approval the language of the Supreme Court of New York in *Webb v. Buckelew*, 82 N. Y. 560, where it is said: 'Until final judgment is reached, the proceedings are subject to change and modification, are imperfect and inchoate, and can avail nothing as a bar or as evidence, until the judgment, with its verity as a record, settles finally and conclusively the question at issue; and whenever it fails to fix and determine the rights of the parties, whenever it leaves room for a final decision yet to be made, it is not admissible in another action, for the plain reason that it has finally decided and settled nothing.' In *Story*

v. Story, 100 Cal. 41, the trial Court had admitted in evidence a judgment rendered in another action before the time for an appeal therefrom had expired, and this Court, in reversing the judgment, said: ‘At the time that the Court made its decision in the present case, the other action was still pending (Code Civ. Proc., sec. 1049), and while that action was so pending the judgment rendered therein could not be a bar to the prosecution of the present action.’ In Brown v. Campbell, 100 Cal. 635, the Court expounds the doctrine that *res adjudicata* applies only to final judgments, and proceeds: ‘The time to appeal from the judgment of November 24 had not expired when the cross-complaint was filed, and although no appeal had been taken therefrom, the action was still pending, within the legal meaning of the term, and the judgment was not a bar to a retrial of the matters alleged in the cross-complaint, under the rule announced by this Court.’ [25] (Citing cases.) While, as pointed out by Mr. Justice Harrison in his concurring opinion in Naftzger v. Gregg, 99 Cal. 83, and in Cook v. Rice, 91 Cal. 664, cases may arise in which, for certain purposes, a judgment may be evidentiary before it has become final, these cases are exceptional, and the general rule prevailing in this state is that which has been so frequently declared.”

Thus we have here a decision of the Supreme Court of California construing the statutes of that State and determining that the judgment in the case

of Douglas v. Berlin Dye Works rendered by the Superior Court of the State of California was not final at the time of the filing of the petition in bankruptcy herein and did not become final until January 16th, 1915, when the judgment in the Supreme Court of California on appeal became final.

In re Yates, *supra*, was a motion by one Risdon to vacate the decree of adjudication of the District Court of the Northern District of California made January 2d, 1902, by which Yates was upon his voluntary petition adjudicated a bankrupt. The only debt mentioned in the schedule filed with the petition for adjudication was described as a judgment in favor of said Risdon rendered by the Superior Court of the State of California in and for the County of Napa on August 31st, 1901; the judgment referred to was obtained in an action for a willful and malicious injury to the person of Risdon; that after its rendition and before the decree of adjudication in bankruptcy an appeal was taken from that judgment to the Supreme Court of the State and such appeal was pending at the time of the making of the motion to vacate the decree of adjudication. District Judge DeHaven in delivering the opinion of the Court, after quoting from Harris vs. Barnhart, 97 Cal. 550, referred to in the [26] opinion of Mr. Justice Henshaw in Feeney v. Hinckley, *supra*, and also section 1049 of the Cal. Code of Civil Procedure, *supra*, said:

“The appeal, therefore, from the judgment in the action of Risdon v. Yates suspended its operation, and may result in its reversal; and from this it fol-

lows that at the date of the adjudication in bankruptcy, there was not, nor is there now, any certainty that the plaintiff in the action referred to will succeed in the recovery of any judgment against Yates. Such being the status of the claim of damages involved in that action, it is clear that Yates was not at the date of the filing of his voluntary petition a bankrupt, within the meaning of the law. Section 4 of the Bankruptcy Act provides that 'any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt.' In subdivision 11 of Section 1 of that act the word "debt" is defined as 'any debt, demand, or claim provable in bankruptcy'; and subdivision "a" of section 63 of the Bankruptcy Act enumerates five different classes of debts which may be proved against the estate of the bankrupt, in one of which is included 'a claim for a fixed liability as evidenced by a judgment or instrument in writing, absolutely owing by the bankrupt at the time of the filing of the petition against him'; but a cause of action against him for unliquidated damages for a personal tort, such as is involved in the action of Risdon v. Yates, before referred to, is not within either of the classes named. Subdivision "b" of the same Section provides:

'Unliquidated claims against the bankrupt may, pursuant to application to the Court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.'

[27]

This subdivision is not to be construed as au-

thorizing the proof of claims not declared in subdivision "a" to be provable. Its object is simply to provide that unliquidated claims which fall within the scope of subdivision "a" are to be liquidated in such manner as the Court shall direct. Lowell, Bankr., p. 487; and see, also, the well-considered opinion of Judge Marshall in the case of *In re Hirschman*, 4 Am. B. R. 716, 104 Fed. 69. In the case of *In re Maples*, 5 Am. B. R. 426, 105 Fed. 919, it was held that the bankruptcy proceeding should be dismissed, where the only debt scheduled was a judgment for willful and malicious injury to the person, —a debt which, although provable under the provisions of the Bankruptcy Act would not be affected by a discharge. With much stronger reason should the decree adjudging Yates a bankrupt be vacated, and the proceeding instituted by him be dismissed, because at the date of the filing of his voluntary petition there was no existing provable debt against his estate under the Bankruptcy Act. It will be time enough for him to apply for relief under the Bankruptcy Act, and to ask the Court to pass upon the many questions which may arise in such a proceeding, when it shall be ascertained that he is indebted to some person upon a claim provable under the Bankrupt Act."

Cases in states where judgments become final and binding and may be resorted to and used as evidence and for all purposes for which a judgment may be resorted to, immediately upon their rendition, are clearly distinguishable from judgments rendered in the courts of the State of California and which

are not final until their final determination upon appeal or until the time for appeal has passed. Such is the case of *re Sheehan*, 8 N. B. R. 345; Fed. C. 12,737; *in re Lorde*, 22 A. B. A. 201. [28]

In *re Putnam*, 193 Fed Rep. 464, relied upon by counsel for claimant, was a proceeding by Kate C. Putman and others to have J. A. Folger as a director and stockholder in the Ocean Railroad Company declared a bankrupt. The preliminary liability to Kate C. Putman was upon a judgment for negligently causing the death of Frank C. Putman which fixed the secondary liability of said Folger as a director and stockholder of the Railway Company. The Court found, however, in that case that the judgment aforesaid was a final judgment which distinguishes it from the case at bar.

There is a striking analogy between the attempt to prove this claim upon the judgment rendered by the Superior Court of California and an attempt to prove a claim upon the verdict of a jury in an action whereon there is a motion for a new trial pending and where no judgment has been rendered upon the verdict.

In *Black v. McClellan* Fed. Cases No. 1462, on appeal from the District Court of the United States for the Western District of Pennsylvania it appeared that an application had been made to the District Court of the United States to permit the plaintiff to issue process on a judgment obtained by Black against McClellan in the State Court for personal injuries done by the defendant to the plaintiff. A verdict was rendered on the 12th day of January,

1875, and on the 15th day of January, 1875, a motion for a new trial was made. The motion for new trial was denied and a judgment was entered on the verdict on the 6th of May, 1875. After the verdict and prior to the entry of the judgment, to wit, on the 20th day of March, 1875, McClellan filed a petition in bankruptcy and was, on the same day, duly adjudged a bankrupt. Under the Bankruptcy Act then in force, the time of adjudication of bankruptcy was fixed as [29] the day with reference to which the provable character of the bankrupt's liabilities was to be determined.

McKENNAN, Circuit Judge, said:

"The question, then, upon which the result of the present proceeding depends is whether the amount of the verdict is a provable debt against the bankrupt. In England this was long a subject of contention, and the decisions of the English courts touching it are in direct conflict with each other. But in *Ex parte Hill*, 11 Ves. 646, where the question came before Lord Eldon, incidentally, he discussed most of the cases on both sides of it, and expressed strong doubt of the soundness of those which held that a verdict in an action for damages for a tort was a provable debt in bankruptcy, and in *Ex parte Charles*, 16 Ves. 256, where it was directly presented for decision, he ordered a commission in bankruptcy to be superseded which was issued upon a creditor's petition, whose debt consisted of a verdict for damages in an action of breach of promise of marriage rendered before the act

of bankruptcy, and upon which judgment was entered before the allowance of the commission. At the same time he directed a case to be stated for the opinion of the judges of the king's bench, who after full argument and deliberate consideration of the question, with all the cases bearing upon it, unanimously certified their opinion that the debt of the petitioning creditor was not sufficient in law to support the commission. *Ex parte Charles*, 14 East, 197. Since then the law has been settled accordingly in England.

The phraseology of the American act seems to have been employed with reference to the exposition of the English statute. All debts due or owing before the bankruptcy are provable under the British statute, but in the enumeration in the American act, this class of provable indebtedness is restricted to debts which are not only due, but payable at the time of the [30] adjudication, or whose payment is postponed to a future day.

Now, a claim which has not obtained the condition of a fixed liability cannot be characterized as a debt due and payable, either presently or at a future day, and such is the immature character of a mere verdict before judgment. It is subject to the control and discretion of the court, and may be superseded altogether by arresting judgment upon it, or by the allowance of a new trial. No action could be maintained upon it; it does not bear interest, and no determinate

character is impressed upon it until the Court has pronounced its judgment, that the plaintiff do recover from the defendant the amount of it. The judgment establishes the indebtedness and impresses the obligation of payment, and so may be said to create the debt. Not until it has passed is there a debt due and payable."

To the same effect is *In re Ostron*, 26 A. B. R. 273, where the Court held that where a claimant's assignor recovered a verdict against the bankrupt for personal injuries, but no judgment had been entered thereon prior to the bankruptcy proceedings, the verdict was not a fixed liability within section 63a (1) of the Bankruptcy Act.

I am of the opinion that the claim sought to be proved here was not a fixed liability absolutely owing at the time of the filing of the petition against this bankrupt. It was subject to the control and judgment of the Supreme Court of the State of California. It might have been superseded altogether by its reversal. No action could be maintained upon it. It was not evidence of any other proceeding until it had become final in the Supreme Court. It was not *res adjudicata* until it had become a final judgment. To be absolutely owing it must be owing beyond peradventure, positively, and unconditionally. No modified definition can be given to the expression in the statute of "absolutely owing."

[31]

It is futile to argue that the claim is a liquidated claim by reason of the judgment entered in the Superior Court of Los Angeles County; it could only

be liquidated when that judgment became a final judgment. It is not such a claim as can be liquidated subsequent to the filing of the petition in bankruptcy. Clause "b" of Section 63, to the effect, that—"unliquidated claims against the bankrupt may, pursuant to application to the Court, be liquidated in such manner as it shall direct," does not enlarge the class of provable debts, but simply provides for reducing into form, in which they may be proved, those debts, which, if liquidated, could be proved, under clause "a" as being either judgment debts, contract debts, taxes or costs. 1 Remington on Bankruptcy, Sec. 705, and cases cited.

It is not an answer to this position that because the defendant in the judgment did not give a supersedeas bond that the plaintiff could have had execution upon his judgment of the Superior Court and satisfied the same by a levy. Under the statute of California if the judgment had been satisfied it would be no longer a pending action; but the intervention of the bankruptcy proceedings within four months after the rendition of the judgment followed by the adjudication of the bankrupt would have dissolved any lien that claimant might have had by reason of the judgment or by reason of any execution that he might have issued thereon. An appeal upon a bond for costs was as an effective appeal to cause the action to be still pending, as a supersedeas bond. Moreover the right of appeal in any way, had not expired at the time of the filing of the petition in bankruptcy. [32.]

This is not a claim such as is contemplated by the

Statute Section 53a (5) "founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for discharge." This provision of the Bankruptcy Act does not enlarge the classes of debts provable against bankrupt's estate, for only those debts made provable where the original obligations merge in the judgment, are in themselves provable debts.

"The original obligation must itself have been a provable debt; that is to say, must have been a judgment or written instrument, or costs, or taxes, or any open account, or a contract, expressed or implied; and it must have been in existence at the time of the filing of the bankrupt's petition. Thus, a judgment for personal injury rendered before discharge, but after the filing of the petition, is not a provable debt. The nature of the liability, rather than the remedy by which it was enforced, determines its provability." 1 Remington on Bankruptcy, Section 697; *In re Crescent Lumber Company*, supra; *In re Southern Steel Company*, 25 A. B. R. 358, 183 Fed. 498.

The object of this provision of the Bankruptcy Act was to permit judgment to be taken after bankruptcy, where a judgment is necessary to fix the liability of those secondarily liable for the bankrupt without destroying the bankrupt's right to discharge therefrom. Evidently it is the original debt not the judgment that is to be proved. [33]

For the foregoing reasons the claim of C. K. Doug-

las will be disallowed and an order will be prepared accordingly.

LYNN HELM,
Referee In Bankruptcy.

[Endorsed] : No. ——. In the United States District Court, Southern District of California, Southern Division. In the Matter of Berlin Dye Works and Laundry Company, a Corporation, Bankrupt. On Proof of Claim of C. K. Douglas. Filed Mar. 30, 1915, at —— min. past 2 o'clock P. M. Lynn Helm, Referee. C. Meade, Clerk. Lynn Helm, 918 Title Insurance Building, Los Angeles, Cal. [34]

The question presented is whether or not said order was a proper order in said proceedings, and whether or not said claim of C. K. Douglas was allowable and provable against the bankrupt estate herein.

There are no facts other than those recited in said order pertinent to this review.

I hand up herewith the claim of C. K. Douglas, and the objections of William H. Moore, Jr., Trustee, and the supplemental affidavit of E. B. Drake.

Respectfully submitted,
LYNN HELM,
Referee in Bankruptcy. [35]

*In the District Court of the United States, for the
Southern District of California, Southern Di-
vision.*

IN BANKRUPTCY No. 1367.

In the Matter of BERLIN DYE WORKS AND
LAUNDRY COMPANY, a Corporation,
Bankrupt.

Petition (to Referee) for Review.

To the Honorable LYNN HELM, Referee in Bank-
ruptcy for the Southern District of California,
Southern Division.

C. K. Douglas, a citizen in and of the County of Los Angeles, in the Southern District of California, Southern Division thereof, respectfully represents to the said Referee:

That on the 6th day of April, 1915, the said Referee made an Order disallowing and expunging from the files herein the certain claim of your petitioner theretofore filed on the 14th day of February, 1914, in the above-entitled cause for \$10,513.32, which claim was based upon a judgment of the Superior Court of the State of California, in and for the County of Los Angeles, in favor of said Douglas and against said bankrupt, rendered on the 11th day of July, 1913, for the sum of \$10,000.00 and the costs thereof, \$97.10, and which judgment was duly affirmed in the Supreme Court of the State of California on the 17th day of December, 1914; that a copy of said Order is in words and figures as follows, to wit:

"IT IS ORDERED, ADJUDGED AND DECREED that the claim of C. K. Douglas, filed herein on February 14th, 1914, be disallowed and expunged from the files.

DATED: April 6th, 1915.

(Signed) LYNN HELM,
Referee in Bankruptcy."

The claim of your petitioner, C. K. Douglas, is more fully and particularly set out in his proof of unsecured debt now on file before said Referee, to which reference is hereby made for further particulars.

Your petitioner respectfully urges that the Referee herein erred in his Order disallowing the said claim and expunging the same from the files herein against the said estate, in this, that the said claim was allowable and provable against the bankrupt estate herein; your petitioner citing and believing this as an error hereby asks for a review from the Referee's Order as above indicated.

Your petitioner further prays that the Referee herein forthwith certify to the District Court of the United States, Southern District of California, Southern Division, or a Judge thereof, the question following, to wit:

Is a person entitled to have his claim proved and allowed against a bankrupt estate, which claim is based upon a judgment of the Superior Court of the State of California, in and for the County of Los Angeles, dated July 11th, 1913, growing out of personal injuries of such claimant received through the negligence of the bankrupt on the 30th day of No-

vember, 1912, the adjudication of bankruptcy being on the 7th day of October, 1913, and claim on said judgment being filed but not heard until after the said judgment became final by affirmance in the Supreme Court of said State. [37]

WHEREFORE, your petitioner feeling aggrieved because of such Order, prays that the same be reviewed as provided in the Bankruptcy Law of 1898 and General Order XXVII.

Dated, Los Angeles, California, April 14th, 1915.

C. K. DOUGLAS,

Petitioner.

E. B. DRAKE,

Attorney for Petitioner.

State of California,

County of Los Angeles,—ss.

I, C. K. Douglas, the petitioner mentioned and described in the foregoing Petition, do hereby make solemn oath that the statements therein contained are true to the best of my knowledge, information and belief.

C. K. DOUGLAS.

Subscribed and sworn to before me this 16th day of April, 1915.

[Seal]

MORA BARNES,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Original. In Bankruptcy No. 1367. In the District Court of the United States for the Southern District of California, Southern Division. In the Matter of Berlin Dye Works & Laundry Com-

pany, a Corporation, Bankrupt. Petition for Review. Received copy of the within Petition this 16th day of April, 1915. W. T. Craig & Carroll Allen, Dave Smith & Benj. F. Page, Attorneys for Trustee. E. B. Drake, Attorney at Law, 1308-9-10 Washington Building, Main 3073 F 3815, Los Angeles, Cal., Attorney for Petitioner. Filed Apr. 16, 1915, at —— min. past 3 o'clock P. M. Lynn Helm, Referee. C. Meade, Clerk.

[Endorsed]: No. 1367. In the United States District Court, Southern District of California, Southern Division. In the Matter of Berlin Dye Works & Laundry Company, Bankrupt. Certificate for Review on Claim of C. K. Douglas. Filed Apr. 26, 1915, at 30 min. past 12 o'clock P. M. Wm. M Van Dyke, Clerk, Murray C. White, Deputy. Lynn Helm, 918 Title Insurance Building, Los Angeles, Cal. [38]

In the District Court of the United States for the Southern District of California, Southern Division.

IN BANKRUPTCY—No. 1367.

In the Matter of BERLIN DYE WORKS & LAUNDRY COMPANY, a Corporation, Bankrupt.

Notice of Motion to Set for Hearing.

To W. T. Craig, et al., Esqs., Attorneys for Wm. H. Moore, Jr., Trustee:

Your are hereby notified that C. K. Douglas, Claimant herein, will, by counsel, on Monday, May 3d, 1915, at 10 o'clock A. M., or as soon thereafter

as counsel can be heard, before Honorable OSCAR A. TRIPPET, Judge of the above, court in his court-room thereof, in the Federal Building, in the City and County of Los Angeles, State of California, move the Court to set the above matter for hearing of the certified question and record herein in which the said Douglas was refused allowance of his claim against the bankrupt estate, for such a date as said Court's calendar will permit.

The ground of said motion is that a question, of which said Court has jurisdiction, has been duly certified by the Referee in bankruptcy herein, for decision by this Court, [39]

Said motion will be made upon the papers on file, together with this notice of Motion.

Dated, April 28th, 1915.

E. B. DRAKE,

Attorneys for Claimant, C. K. Douglas.

[Endorsed]: Original. In Bankruptcy No. 1367. In the District Court of the United States for the Southern District of California, Southern Division. In the Matter of Berlin Dye Works & Laundry Company, a Corporation, Bankrupt. Notice of Motion to Set for Hearing of Certified Question. Received Copy of the Within Notice this 28th day of April, 1915. W. T. Craig, Dave F. Smith, Benj. Page, Attorneys for Trustee. E. B. Drake, Attorney at Law, 1308-9-10 Washington Building, Main 3073 F 3815, Los Angeles, Cal., Attorney for Claimant. Filed Apr. 28, 1915, at 2 min. past 4 o'clock P. M. Wm. M. Van Dyke, Clerk. Murray C. White, Deputy. [40]

In the District Court of the United States for the Southern District of California, Southern Division.

IN BANKRUPTCY—No. 1367.

In the Matter of BERLIN DYE WORKS & LAUNDRY COMPANY, a Corporation,
Bankrupt.

Notice of Date of Hearing and Argument on Certified Question in Claim of C. K. Douglas.

To W. L. Craig, et al., Esqs., Attorneys for Wm. H. Moore, Jr., Trustee:

You are hereby notified that the hearing and argument on Certified Question in the Claim of C. K. Douglas in the above-entitled matter has been set for 2 o'clock P. M., Monday, May 24th, 1915, before Honorable Oscar A. Trippet, Judge of the above court, in his courtroom thereof in the Federal Building, in the City and County of Los Angeles, State of California.

Dated, May 6th, 1915.

E. B. DRAKE,

Attorney for Claimant, C. K. Douglas.

[Endorsed]: Original. In Bankruptcy, No. 1367. In the District Court of the United States for the Southern District of California, Southern Division. In the Matter of Berlin Dye Works & Laundry Company, a Corporation, Bankrupt. Notice of Date of Hearing and Argument on Certified Question in Claim of C. K. Douglas. Received copy of the within notice this 6th day of May, 1915. W. T. Craig, Carroll Allen, A. Henderson, Stockton Attor-

neys for Trustee. E. B. Drake, Attorney at Law, 1308-9-10 Washington Building, Main 3073 F 3815, Los Angeles, Cal., Attorney for Claimant. Filed May 6, 1915, at 9 min. past 4 o'clock P. M. Wm. M. Van Dyke, Clerk. Murray C. White, Deputy. [41]

In the United States District Court, Southern District of California, Southern Division.

IN BANKRUPTCY—No. 1367.

In the Matter of BERLIN DYE WORKS & LAUNDRY COMPANY (a Corporation), Bankrupt.

Opinion of the Court.

E. B. DRAKE, for Plaintiff.

W. T. CRAIG, CARROL ALLEN, DAVE F. SMITH, BENJAMIN E. PAGE, and A. HENDERSON STOCKTON, for Trustee.

C. K. Douglas brought suit against the Berlin Dye Works and Laundry Company, in the Superior Court of California, for injuries to his person resulting from a tort. He obtained judgment against the defendant, and the defendant appealed therefrom without giving a supersedeas bond. Thereafter, an involuntary petition in bankruptcy was filed, and the defendant was declared a bankrupt. Douglas presented a claim against the bankrupt estate, for allowance, based upon said judgment, while the appeal was pending. Whether the claimant's judgment is provable depends upon whether or not it is a final judgment. Section 942 of the Code of Civil Procedure of California, provides that if the appeal

be from a judgment or order directing the payment of money such as this judgment is, it does not stay the execution of the judgment unless a bond is given for said purpose. It has been held by the Supreme Court of California that, during the time allowed for an appeal, and while an appeal is pending from a judgment, it cannot be introduced in evidence, and the Statute of Limitations does not run against [42] a suit thereon. *Feeney vs. Hinckley*, 134 Cal. p. 467. This case was decided by a divided court. The great weight of authority is to the effect that the pendency of an appeal will not deprive the plaintiff of his right to sue on the judgment, unless there has been a stay of proceedings. 23 Cyc. 1504, 1563; 2 Cyc. 974; *Taylor vs. Shew*, 39 Cal. 536; *Dowdell vs. Carpy*, 137 Cal. 338; *Rogers vs. Superior Court*, 126 Cal. 183; *Cook vs. Rice*, 91 Cal. 668; *Dore vs. Southern Pacific Company*, 163 Cal. 195.

The case of *Taylor vs. Shew*, supra, was an action upon a judgment obtained in New York, from which an appeal had been taken without a supersedeas bond. The Supreme Court of California said:

“In the absence of any proof to the contrary, the presumption is that the effect of the alleged appeal by the laws of New York is the same as in this State; and in this State such appeal would not stay execution or proceedings for the collection of the amount of the judgment appealed from, pending the appeal, nor destroy or weaken the force and effect of the record of

the judgment as evidence of the facts or matters necessarily determined thereby."

This opinion of the Supreme Court of California has never been reversed or criticised. It has been cited, with approval, in many jurisdictions, and the Supreme Court of California has approved it. The case is in conflict with the decision in *Feeney vs. Hinckley*, *supra*, and the cases relied upon in that decision. To say that an action may be brought upon a judgment from which an appeal has been taken without a supersedeas bond, but that such judgment could not be introduced in evidence, would be a paradox. It would be keeping the word of promise to the ear and breaking it to the hope.

The matter, however, was before the Supreme Court of [43] California in a more recent decision than *Feeney vs. Hinckley*. In *Dowdell vs. Carpy*, 137 Cal. 338, the Court said:

"On the appeal taken from that judgment no bond staying execution had been filed, and, treating it as a deficiency judgment in accordance with the stipulation, there was, then, nothing to prevent an action being brought on such judgment at any time after it was rendered. (*Taylor vs. Shew*, 39 Cal. 536; *Clark vs. Child*, 136 Mass. 344.) The judgment was a proper basis for an action, and as it arose out of the same transaction and is connected with the subject of this action, it was clearly the proper basis for a counterclaim herein. (Code Civ. Proc., sec. 438.)" The judgment rendered in favor of the claimant, was final, and created an absolute liability of the Bankrupt. Notwithstanding the appeal from

the judgment, it could not be reversed or modified. This is necessarily so because the judgment contained no error or infirmity upon which the Supreme Court could predicate a reversal or modification. The question is asked, however, how is this Court to know whether or not it would be reversed or modified until the appeal is finally disposed of. That can be ascertained by an inspection of the record, or by postponing the matter until the Supreme Court acts. The Referee pursued the latter course in this matter. This practice was approved in Bank of America vs. Wheeler, 28 Conn. 433; Dawson vs. Daniel, 7 Fed. Cases, 3668, and by the Supreme Court of California in Dore vs. Southern Pacific Company, 153 Cal. 195.

The claim will be allowed.

July 6th, 1915.

OSCAR A. TRIPPET,
Judge. [44]

No. 1367. Bkcy. U. S. District Court, Southern District of California, Southern Division. In the Matter of Berlin Dye Works & Laundry Company (a corporation), Bankrupt. Opinion. Filed July 6, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [45]

[Order Reversing Order of Referee in Bankruptcy
and Allowing Claim of C. K. Douglas, etc.]

At a stated term, to wit, the January term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the City of Los Angeles, on Tuesday, the sixth day of July, in the year of our Lord, one thousand nine hundred and fifteen. Present: The Honorable OSCAR A. TRIPPET, District Judge:

No. 1367—Bkcy. S. D.

In re BERLIN DYE WORKS & LAUNDRY COMPANY, Bankrupt.

This matter having heretofore been submitted to the Court for its consideration and decision on a review of the order of the Referee in bankruptcy disallowing the claim of C. K. Douglas; the Court, having duly considered the same and being fully advised in the premises, now hands down its opinion herein, and it is ordered accordingly, that the said order of the Referee in bankruptcy be, and the same hereby is reversed, and that said claim of C. K. Douglas be, and the same hereby is allowed, to which ruling of the Court, W. T. Craig, Esq., of counsel for the Trustee, asks for, and is, by the Court, allowed an exception. [46]

*In the District Court of the United States, Southern
District of California, Southern Division.*

In the Matter of BERLIN DYE WORKS AND
LAUNDRY COMPANY, a Corporation,
Bankrupt.

Judgment.

The above cause coming on to be heard before the Court on Petition for Review on the Claim of C. K. Douglas, seeking to have reviewed the Findings, and Order thereon, of Lynn Helm, Referee, disallowing and expunging from the files the certain claim of the said C. K. Douglas, Petitioner, filed on the 14th day of February, 1914, and which Order was entered April 6th, 1915, by said Referee, and the question being certified to this Court, as follows, to wit:

Is a person entitled to have his claim proved and allowed against a bankrupt estate, which claim is based upon a judgment of the Superior Court of the State of California, in and for the County of Los Angeles, dated July 11th, 1913, growing out of personal injuries of such claimant received through the negligence of the bankrupt on the 30th day of November, 1912, the adjudication of bankruptcy being on the 7th day of October, 1913, and claim on said judgment being filed but not heard until after said judgment became final by affirmance in the Supreme Court of said State.

And the Court having heard argument of counsel and being fully advised is of the opinion that the said question so certified should be answered in the

affirmative, and, therefore, [47] that the said claim of C. K. Douglas should be allowed, a written Opinion of the Court so holding thereon being filed herein.

IT IS, THEREFORE, ORDERED, DECREED AND ADJUDGED that the Finding of the Referee, and his Order thereon of April 6th, 1915, disallowing the said claim of the said C. K. Douglas and expunging the same from the files herein, be, and the same is hereby, reversed and set aside, and the said Referee is ordered and directed to allow said claim as a provable one against the assets of said Bankrupt Estate.

Dated, July 7th, 1915.

OSCAR A. TRIPPET,

Judge.

[Endorsed]: Original. In Bankruptcy. No. 1367. In the District Court of the United States for the Southern District of California, Southern Division. In the Matter of Berlin Dye Works and Laundry Company, a Corporation, Bankrupt. Order on Claim of C. K. Douglas. Filed Jul. 7, 1915, at 40 min. past 3 o'clock P. M. Wm. M. Van Dyke, Clerk. Murray C. White, Deputy. E. B. Drake, Attorney at Law, 1308-9-10 Washington Building. Main 3073 F 3815, Los Angeles, Cal., Attorney for Claimant. [48]

ORIGINAL.

*In the District Court of the United States, Southern
District of California, Southern Division.*

IN BANKRUPTCY—No. 1367.

In the Matter of BERLIN DYE WORKS & LAUN-
DRY COMPANY, a Corporation,
Bankrupt.

C. K. DOUGLAS,

Petitioner,

vs.

WM. H. MOORE, Jr., Trustee in Bankruptcy of
the Estate of BERLIN DYE WORKS &
LAUNDRY COMPANY, a Corporation,
Bankrupt,

Respondent.

Notice of Appeal.

To E. B. Drake, Esq., Attorney for Claimant and
Petitioner, C. K. Douglas, and Wm. M. Van
Dyke, Esq., Clerk of the District Court of the
United States, Southern District of California:

Sirs: Please take notice that Wm. H. Moore, Jr.,
Trustee in bankruptcy of the above named, Berlin
Dye Works & Laundry Company, a corporation,
bankrupt, hereby appeals from the minute order en-
tered herein on the 6th day of July, 1915, and from
the order signed and filed herein on the 7th day of
July, 1915, and from each of said orders, reversing
and setting aside the order heretofore made herein
by the Honorable Lynn Helm, Referee in bank-
ruptcy, disallowing the claim of C. K. Douglas and

expunging same from the files herein, and ordering and directing that said claim be allowed as a provable claim against the assets of said bankrupt estate, to the Circuit Court of Appeals [49] for the Ninth Circuit, to be holden in and for said Circuit at the City of San Francisco, in the State of California.

Dated, July 10th, 1915.

Yours, etc.,

W. T. CRAIG and

CARROLL ALLEN,

BENJAMIN E. PAGE,

DAVE F. SMITH,

Attorneys for Said Trustee.

[Endorsed]: Original. No. 1367. Bankruptcy. In United States District Court, Southern District of California, Southern Division. In the Matter of Berlin Dye Works & Laundry Company, a Corporation, Bankrupt. C. K. Douglas, Petitioner, vs. Wm. H. Moore, Jr., Trustee. Notice of Appeal. Received Copy of the Within Notice of Appeal this 12 day of July, 1915. E. B. Drake, Attorney for C. K. Douglas, Petitioner. W. T. Craig & Carroll Allen, Benjamin E. Page & Dave F. Smith, Attorneys for Trustee. Filed July 12, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [50]

ORIGINAL.

*In the District Court of the United States, Southern
District of California, Southern Division.*

In the Matter of BERLIN DYE WORKS & LAUN-
DRY CO., a Corporation,

Bankrupt,

C. K. DOUGLAS,

Petitioner,

vs.

WM. H. MOORE, Jr., Trustee,

Respondent.

Assignment of Errors.

Comes now Wm. H. Moore, Jr., Trustee in bank-
ruptcy of the estate of said Berlin Dye Work &
Laundry Company, a corporation, bankrupt, and
files the following assignment of errors:

First: The United States District Court for the
Southern District of California, Southern Division,
erred in reversing and setting aside the finding and
order of the Referee in said bankruptcy proceeding,
disallowing and expunging from the files the claim of
said C. K. Douglas.

Second. Said Court erred in ordering and direct-
ing said Referee to allow said claim of C. K. Doug-
las as a provable claim in bankruptcy.

Third. Said Court erred in allowing said claim
of C. K. Douglas as a provable claim against the es-
tate of said bankrupt.

Fourth. Said Court erred in not finding that said
claim was not a provable claim against the estate of
said bankrupt.

Fifth. Said Court erred in not affirming the finding and order of the Referee herein on the claim of said C. K. Douglas.

W. T. CRAIG and
CARROLL ALLEN,
BENJAMIN E. PAGE,
DAVE F. SMITH,
Attorneys for Said Trustee. [51]

[Endorsed]: Original. No. 1367. Bankruptcy.
In United States District Court, Southern District of California. In the Matter of Berlin Dye Works & Laundry Co., a Corporation, Bankrupt. C. K. Douglas, Petitioner, vs. Wm. H. Moore, Jr., Trustee, Respondent. Assignment of Errors. Received Copy of the Within Assignment of Errors this 12th Day of July, 1915. E. B. Drake, Attorney for C. K. Douglas, Petitioner. W. T. Craig, Board of Trade Rooms, Higgins Building, Los Angeles, Cal. Telephones: Home 10112, Sunset Main 4622. Filed July 12, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [52]

ORIGINAL.

*In the District Court of the United States, Southern
District of California, Southern Division.*

IN BANKRUPTCY—No. 1367.

In the Matter of BERLIN DYE WORKS & LAUN-
DRY COMPANY, a Corporation,
Bankrupt.

C. K. DOUGLAS,

Petitioner

vs.

WM. H. MOORE, Jr., Trustee in Bankruptcy of
the Estate of BERLIN DYE WORKS &
LAUNDRY COMPANY, a Corporation,
Bankrupt,

Respondent.

**Petition for Allowance of Appeal and Order
Allowing the Same.**

To the Honorable Judges of the United States Dis-
trict Court for the Southern District of Cali-
fornia:

Wm. H. Moore, Jr., Trustee in bankruptcy of the estate of the above-named bankrupt, conceiving himself aggrieved by the Minute Order entered on the 6th day of July, 1915, and by the Order signed and filed on the 7th day of July, 1915, in the above-en-titled proceeding, and by each of said Orders, reversing and setting aside the order of the Referee theretofore made in said proceeding, disallowing the claim of C. K. Douglas and expunging the same from the files of the case, and ordering and direct-

ing that said claim be allowed as a provable claim against the assets of said bankrupt estate, does hereby petition for an appeal from the said orders, and from each of them, to the United States Circuit Court of Appeals for the Ninth Circuit, [53] and prays that his *his* appeal may be allowed and a citation granted directed to the said C. K. Douglas, commanding him to appear before the United States Circuit Court of Appeals for the Ninth Circuit to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record in said proceeding, duly authenticated, may be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

WM. H. MOORE, Jr.,
Trustee.

W. T. CRAIG and
CARROLL ALLEN,
BENJAMIN E. PAGE,
DAVE F. SMITH,
Attorneys for Said Trustee.

The foregoing appeal is hereby allowed.

Dated, July 12, 1915.

OSCAR A. TRIPPETT,
District Judge.

[Endorsed]: No. 1367. Bankruptcy. Original. In United States District Court, Southern District of California, Southern Division. In the Matter of Berlin Dye Works & Laundry Company, a Corporation, Bankrupt. C. K. Douglas, Petitioner, vs. Wm. H. Moore, Jr., Trustee, etc., Respondent. Petition for Allowance of Appeal and Order Allowing the

Same. Received Copy of the Within Petition this 12th day of July, 1915. E. B. Drake, Attorney for C. K. Douglas, Petitioner. W. T. Craig & Carroll Allen, Benjamin E. Page & Dave F. Smith, Board of Trade Rooms, Higgins Building, Los Angeles, Cal. Telephones: Home 10112, Sunset Main 4622, Attorneys for Trustee. Filed July 12, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [54]

ORIGINAL.

In the District Court of the United States, Southern District of California, Southern Division.

IN BANKRUPTCY—No. 1367.

In the Matter of BERLIN DYE WORKS & LAUNDRY COMPANY, a Corporation,
Bankrupt,

Praecipe for Transcript of Record.

To the Clerk of Said Court:

Sir: Please issue a certified copy of the records in the above-entitled proceeding, consisting of the papers following:

1. Proof of Unsecured Debt of C. K. Douglas.
2. Supplemental Affidavit of E. B. Drake.
3. Objection of Trustee to Claim of C. K. Douglas.
4. Certificate for Review on Claim of C. K. Douglas and Petition for Review.
5. Notice of Motion to Set Certified Question for Hearing.
6. Opinion of Court.
7. Minute Order of July 6th, 1915.

8. Order Signed and Filed Herein, July 7th, 1915.
9. Notice of Appeal.
10. Petition for Appeal and Allowance of Same.
11. Assignment of Errors.
12. Citation.
13. Praeclipe for Transcript of Record. Said Record to be Certified Under the Hand of the Clerk and the Seal of the Court.

W. T. CRAIG and
CARROLL ALLEN,
BENJAMIN E. PAGE,
DAVE F. SMITH,
Attorneys for Trustee. [55]

Receipt of a copy of the foregoing Praeclipe is hereby admitted this 16th day of July, 1915, and it is stipulated and agreed that the papers mentioned and described therein are all the papers necessary to a determination by the Circuit Court of Appeals of the appeal prosecuted by said Trustee.

E. B. DRAKE,
Attorney for Claimant and Petitioner, C. K. Douglas.

[Endorsed]: Original. No. 1367. In United States District Court, Southern District of California, Southern Division. In the Matter of Berlin Dye Works & Laundry Company, a Corporation, Bankrupt. Praeclipe for Transcript of Record. Filed Jul. 16, 1915, at 20 Min. Past 4 o'clock P. M. Wm. M. Van Dyke, Clerk. Murray C. White, Deputy. W. T. Craig, Board of Trade Rooms, Higgins Building, Los Angeles, Cal. Telephones: Home

10112, Sunset Main 4622. Attorneys for Trustee.

[56]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

BKCY.—No. 1367.

In the Matter of BERLIN DYE WORKS & LAUN-
DRY COMPANY, a Corporation,
Bankrupt.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing fifty-six (56) typewritten pages, numbered from 1 to 56, inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the Proof of Unsecured Debt due C. K. Douglas, Objection to Claim of C. K. Douglas, Supplemental Affidavit of E. B. Drake, Certificate of Referee for Review on Claim of C. K. Douglas, Notice of Motion to set for Hearing of Certified Question, Notice of Date of Hearing and Argument on Certified Question, Opinion of the Court on Certified Question, Minute Order of July 6, 1915, reversing Referee, Order of July 7, 1915, reversing Referee and allowing Claim, Notice of Appeal, Assignment of Errors, Petition for Allowance of Appeal and Order Allowing, and Praeclipe for Transcript of Record in the above and therein entitled matter, and that the same

together constitute the record on appeal of the Trustee from the order allowing the claim of C. K. Douglas, as specified in the Praeclipe for Transcript of Record, filed in my office on behalf of the said Trustee. [57]

I do further certify that the cost of the foregoing record is \$28.10, the amount whereof has been paid me by Wm. H. Moore, Jr., Trustee in bankruptcy of the Estate of Berlin Dye Works and Laundry Company, a Corporation, Bankrupt, the appellant in said matter.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court of the United States, for the Southern District of California, Southern Division, this 30th day of September, in the year of our Lord, one thousand nine hundred and fifteen, and for our Independence, the one hundred and fortieth.

[Seal] WM. M. VAN DYKE,
Clerk of the District Court of the United States of
America, in and for the Southern District of
California.

By Leslie S. Colyer,
Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Cancelled
9/30/15. L. S. C.] [58]

[Endorsed]: No. 2665. United States Circuit Court of Appeals for the Ninth Circuit. Wm. H. Moore, Jr., Trustee in Bankruptcy of the Estate of Berlin Dye Works and Laundry Company, a Corporation, Bankrupt, Appellant, vs. C. K. Douglas, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Received October 4, 1915.

F. D. MONCKTON,
Clerk.

Filed October 6, 1915.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Order Enlarging Time to and Including November 1, 1915, to Docket Cause and File Record in Appellate Court.]

In the United States Circuit Court of Appeals, Ninth Judicial Circuit.

WM. H. MOORE, Jr., Trustee.

In the Matter of BERLIN DYE WORKS & COMPANY (a Corporation),

Appellant.

Good cause appearing therefor, it is hereby ordered that the time heretofore allowed said Appellant to docket said cause and file the record thereof, with the clerk of the United States Circuit Court of

Appeals for the Ninth Circuit, be, and the same is hereby enlarged and extended to and including the 1st day of November, 1915.

Los Angeles, California, August 6th, 1915.

OSCAR A. TRIPPET,

United States District Judge, Southern District of California. [60]

California.

[Endorsed]: No. 2665. United States Circuit Court of Appeals for the Ninth Circuit. Wm. H. Moore, Jr., Trustee. In the Matter of Berlin Dye Works & Company (a Corporation). Order Extending time to File Record. Filed Sep. 7, 1915. F. D. Monckton, Clerk. Refiled Oct. 6, 1915. F. D. Monckton, Clerk.

7

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

No. 2665.

Wm. H. Moore, Jr., Trustee in
Bankruptcy of the estate of Berlin Dye Works & Laundry Company, a corporation, bankrupt,

Appellant,

vs.

C. K. Douglas,

Appellee.

Filed

JAN 2 1916

F. D. Mc. GOWAN
CLERK

BRIEF OF APPELLANT IN ERROR.

W. T. CRAIG AND CARROLL ALLEN,
BENJAMIN E. PAGE, DAVE F. SMITH,
Attorneys for Appellant.

No. 2665.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

Wm. H. Moore, Jr., Trustee in
Bankruptcy of the estate of Ber-
lin Dye Works & Laundry Com-
pany, a corporation, bankrupt,

Appellant,

vs.

C. K. Douglas,

Appellee.

BRIEF OF APPELLANT IN ERROR.

STATEMENT OF FACTS.

Judgment was rendered in favor of said appellee, C. K. Douglas, and against said bankrupt corporation, on July 11, 1913, in the Superior Court of the state of California, in and for the county of Los Angeles, for the sum of \$10,000.00 and costs, in an action theretofore commenced by said appellee against said bankrupt corporation to recover damages for personal injuries suffered by reason of the alleged negligence of

said Berlin Dye Works & Laundry Company. After the entry of said judgment, and on September 10th, 1913, the Berlin Dye Works & Laundry Company appealed from said judgment to the Supreme Court of the state of California, executing a cost bond in the sum of \$300.00, but did not execute a supersedeas bond. [Tr. 12.]

On September 15, 1913, an involuntary petition in bankruptcy was filed against said Berlin Dye Works & Laundry Company, a corporation, and on the 7th day of October, 1913, it was duly adjudicated bankrupt. February 14, 1914, said C. K. Douglas filed a claim against the estate of the above named bankrupt corporation, based upon an abstract of said judgment entered July 11, 1913. April 21st, 1914, the claim of said C. K. Douglas was presented to the bankruptcy court for allowance and oral objections were made thereto at said time by the trustee of the estate of said bankrupt, upon the ground that said C. K. Douglas had no provable claim against the estate of said bankrupt; and on July 23rd, 1914, formal written objections were filed on behalf of said trustee against said claim, on the grounds:

1st. That said claimant was not entitled to prove a claim against the above named bankrupt estate;

2nd. That the judgment upon which said claim was based was not a final judgment, and

3rd. That claimant's proof of debt should be only for the sum of \$10,097.10. [Tr. 7, 8, 13.]

December 17th, 1914, the judgment of the Superior Court in said case upon appeal was affirmed by the Supreme Court of the state of California, and said

judgment became final January 16, 1915. [Tr. 14.] Thereafter said claim of C. K. Douglas was, by order of the referee, disallowed and expunged from the files. From such order a review was taken to the District Court of the United States for the Southern District of California, which court reversed the order of the referee theretofore made and entered and allowed the claim of said C. K. Douglas. [Tr. 42, 43 and 44.] From such order and decree of said District Court this appeal was taken.

POINTS AND AUTHORITIES.

Is a judgment of a Superior Court of the state of California, founded in tort, from which an appeal is pending to the Supreme Court of the state at date of filing of petition in bankruptcy, where no supersedeas bond on appeal was filed, a provable claim in bankruptcy? Counsel for appellant contends that it is not.

To be provable such a judgment must come squarely within the definition of section 63 of the Bankruptcy Act, which reads, so far as it is applicable to this case, as follows:

“DEBTS WHICH MAY BE PROVED.—(a) Debts of the bankrupt which may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not.”

If such a judgment is a fixed liability, absolutely owing at the date of the filing of the petition, it is a provable and allowable claim, otherwise not.

“The status of claims at the time of the filing of the petition in bankruptcy, and not at any subsequent time, fixes the right of the owners to share in the distribution of the estate of the bankrupt.”

Board of Com’rs v. Hurley (C. C. A. 8th Cir.),
169 Fed. 92, 22 A. B. R. 209.

“If at that time it does not fall within that definition (i. e., of Sec. 63), but does so at some later time, it cannot be proved.”

Lowell, C. J., in *In re Pettingell & Co.*, 137 Fed. 143, 145, 14 A. B. R. 728, 731.

Section 63b of the act adds nothing to the class of debts which may be proved under paragraph (a), its purpose being to permit an unliquidated claim coming under the provisions of sub-section (a) to be liquidated as the courts shall direct.

Dunbar v. Dunbar, 190 U. S. 340, 350, 10 A. B. R. 139.

Was the judgment in the instant case a fixed liability, absolutely owing at the date of the filing of the petition?

The Standard Dictionary defines “absolutely” as follows:

“In an absolute degree or manner; without limitation; completely.”

It defines “absolute” as meaning “free from liability to change, fixed, irrevocable.”

If the judgment in question at date of bankruptcy comes within such definition it was a claim provable in bankruptcy, otherwise not.

There is no question but that an unliquidated claim for damages for personal injury not reduced to judgment prior to the filing of the petition, is not provable or allowable in bankruptcy and no citation of authorities on that point is necessary.

One learned bankruptcy author has written a very forceful argument to the effect that a final judgment rendered before bankruptcy is not a provable debt within the meaning of the acts.

See article by the late Mr. Loveland in Case and Comment of February, 1914.

The question here turns upon the force and effect of the judgment in question, and it is the duty of the federal courts in this state to give to judgments of the state courts the same force and effect they have under the state laws.

Sec. 905, U. S. Rev. St.;

Contra Costa Water Co. v. City of Oakland, 165

Fed. 518, 529;

Union etc. Bank v. Memphis, 111 Fed. 561;

Jeter v. Hewitt, 22 How. (U. S.) 352, 364.

Section 577 of the Code of Civil Procedure of the state of California defines a judgment as follows:

“A judgment is the final determination of the right of the parties in an action or proceeding.”

Section 1049 of the same code provides:

“An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied.”

In view of the foregoing it is apparent at a glance that the so-called judgment attached to the claim of C. K. Douglas and which is in question here, was in fact no judgment at all in the sense of being a finality, and at the date of bankruptcy was neither a fixed liability, nor was it absolutely owing. It was not "free from liability to change, fixed, irrevocable" nor was it "unquestionable" and the fact that later it became all of those things does not change its status as it existed at the date of the filing of the petition.

Board of Com'rs v. Hurley, *supra*;
In re Pettingell & Co., *supra*.

We submit that the fact that in California an appeal from a money judgment does not, in itself, stay the execution of the judgment unless a supersedeas bond is filed, should have no consideration in determining this question. That fact does not make the judgment "absolutely owing" nor a "fixed liability," and it is the power and duty of the appellate court under section 957 of the Code of Civil Procedure of the state of California, when any judgment or order is reversed or modified to make complete restitution of all property and rights lost, so far as such restitution is consistent with the protection of the purchaser of property at a sale ordered by the judgment, or had under process issued upon the judgment. Such section also provides for relief in such cases by an action against the respondent enforcing the judgment for the proceeds of the sale of the property, after deducting therefrom the expenses of the sale.

The real test as to the force and effect of such a

judgment as constituting the basis for a claim in bankruptcy at date of filing the petition is, would such a judgment be evidence and conclusive as to the amount due under it? Counsel for trustee contends that regardless of how the law on that point may be in other states, the judgment here in question at date of filing of the petition was not evidence of that fact.

Care must be taken in deciding this case to distinguish between cases arising under state laws where by force of statute a judgment becomes final for all purposes at date of entry, as in Michigan, and cases like *In re Putnam*, 193 Fed. 464, where the judgment in question was final, the time for appeal having elapsed.

In the case of *Hills v. Sherwood et al.*, 33 Cal. 474, the Supreme Court of the state of California held that a right of action for the breach of the covenant in question accrued when time for appeal from judgment expired, and not at date of rendition of same in the lower court, and the court there clearly distinguishes between the force and effect of such a judgment at both dates, in the following language, quoted from page 478 of the opinion:

“Although a judgment may be final with reference to the court which pronounced it, and, as such, be the subject of an appeal, yet it is not necessarily final with reference to the property, or rights affected, so long as it is subject to appeal and liable to be reversed. The ‘final adjudication’ intended by the parties to the covenant in question was, doubtless, an adjudication final as to the land and the rights of the parties. Had an appeal been taken before this action was brought,

unquestionably, the action could not have been maintained until after a final disposition of the appeal."

"While proceedings are pending for the review of a judgment, either on appeal or motion for a new trial, the litigation on the merits of the case between the parties is not ended; and until litigation on the merits is ended, there is no finality to the judgment, in the sense of a final determination of the rights of the parties, although it may have become final for the purpose of an appeal from it."

Gillmore v. American C. I. Co., 65 Cal. 63, 66.

In the case of Harris v. Barnhart, 97 Cal. 546, the judgment was offered in evidence after time for appeal had expired, although at the time answer was filed setting it up as defense the time had not yet expired; the court there held that it was competent evidence at the time offered, there being no objection on the ground that it had been prematurely pleaded, and such objection being waived. The court in such case, on page 550, uses the following language:

"It has been repeatedly held by this court that the operation of a final judgment is suspended by an appeal therefrom, and that pending such appeal the judgment is not admissible in another case as evidence, even between the same parties."

"But it is claimed that the court below erred in admitting in evidence against plaintiff's objection the judgment in the former action, because it had not become final with reference to the subject-matter thereof, as the time for appeal therein had not expired when the trial of this cause was had. We think this claim should be sustained.

“Section 1049 of the Code of Civil Procedure provides that an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied.

“It appears that the judgment in the former action was given and entered July 29, 1890, and that said action was still pending within the meaning of the provisions of the foregoing section when this cause was tried in the court below, which the record shows was commenced on March 12, 1891, more than four months before the time for appeal had passed.

“It therefore follows that the court erred in admitting in evidence the judgment roll in the former action against plaintiff in bar of plaintiff’s right to recover in this action.”

Naftzeger v. Gregg, 99 Cal. 83, 88.

“To prove that fact findings, conclusions of law and decree in the case of Blythe v. Ayers were introduced in evidence. We think them wholly insufficient to prove it. The findings and decree in that action were filed and entered October 22, 1890. The application for an allowance was filed and heard October 31, 1890. The judgment was but nine days old when offered in evidence, and under the statute the losing parties were entitled to an appeal from it at any time within sixty days from its rendition. By virtue of section 1049 of the Code of Civil Procedure, an action is pending until the time for appeal has expired, or the judgment sooner satisfied. This judgment, being but nine days old at the date of the hearing, and not satisfied, afforded no evidence of the facts therein

found, for it was not a final judgment inasmuch as the action was still pending. A judgment, in order to be admissible in evidence for the purpose of proving facts therein recited, must be a final judgment in the cause, and if the action in which the judgment is rendered is still pending, necessarily the judgment is not final. As was said in *Hills v. Sherwood*, 33 Cal. 478: ‘Although a judgment may be final with reference to the court which pronounced it, and as such be the subject of appeal, yet it is not necessarily final with reference to the property or rights affected so long as it is subject to appeal and liable to be reversed.’”

In re Blythe, 99 Cal. 472, 475.

In the above case the Supreme Court quotes with approval the following language from the case of *Webb v. Buckelew*, 82 N. Y. 560:

“‘It is, therefore, only a final judgment upon the merits which prevents further contest upon the same issue, and becomes evidence in another action, between the same parties, or their privies. Until final judgment is reached, the proceedings are subject to change and modification, are imperfect and inchoate, and can avail nothing as a bar or as evidence, until the judgment with its verity as a record settles finally and conclusively the question at issue.’”

And again:

“‘Whenever it fails to fix and determine the ultimate rights of the parties, wherever it leaves room for a final decision yet to be made, it is not admissible in another action, for the plain reason that it has finally decided and settled nothing. Until the judgment comes, no man can know what the ultimate decision will be.’”

“The court erred in holding that the judgment rendered in the other action was a bar to the plaintiff's right of recovery for the moneys paid by her under the agreement. At the time that the court made its decision in the present case, the other action was still pending (sec. 1049, Code Civ. Proc.), and while that action was so pending the judgment rendered therein could not be a bar to the prosecution of the present action.”

In re Story v. Story & Isham C. Co., 100 Cal. 41, 42.

“That judgment was not a bar to the matters alleged in the defendant's answer as a defense, nor to the same matters set out in the cross-complaint, and upon which he demanded the relief given him by the court below. It had not become final when the cross-complaint was filed, nor yet when the action was tried, and the doctrine of *res adjudicata* only applies to final judgments. The time to appeal from the judgment of November 24, 1888, had not expired when the cross-complaint was filed, and, although no appeal had been taken therefrom, the action was still pending within the legal meaning of that term (Code Civ. Proc., sec. 1049), and the judgment was not a bar to a re-trial of the matters alleged in the cross-complaint.”

Brown v. Campbell, 100 Cal. 646.

The Supreme Court in the case of *Feeney v. Hinckley*, 134 Cal. 467, where the question was whether the five-year statute of limitations in a case of action on a judgment commenced to run at date of entry of judgment or at expiration of time for appeal, reviewed the foregoing cases and on the doctrine of those cases reversed the lower court, which held that the statute

began to run at date of entry of judgment. It appears that no appeal from the judgment in question had actually been taken, but that the time for appeal had not as yet expired at the time action was commenced, which date was subsequent to date of entry of judgment. On page 469 of the opinion the court uses the following language:

“While, as pointed out by Mr. Justice Harrison in his concurring opinion in *Naftzger v. Gregg*, 99 Cal. 83, and in *Cook v. Rice*, 91 Cal. 664, cases may arise in which, for certain purposes, a judgment may be evidentiary before it has become final, these cases are exceptional, and the general rule prevailing in this state is that which has been so frequently declared.”

In the case of *Cook v. Rice*, referred to in the above citation, the introduction of the judgment roll as evidence was objected to on the ground that the time for appeal had not expired, and the court held that it was not necessary that such judgment should be final in the sense that it was not liable to be reversed on appeal; that it was enough that it was in court, not suspended by appeal or otherwise. We submit that notwithstanding that the case is not an authority in the instant case, where the appeal was actually taken, that it is out of harmony with the decisions of the state, both prior and subsequent to it.

Judge Harrison, in his concurring opinion in the case of *Naftzger v. Gregg*, *supra*, said that the objection to the introduction of the judgment went to its weight as evidence and not its competency; that it might be shown that there had already been a final determination on

appeal, or the parties might have consented that there should be no appeal, but that in the absence of other evidence than the judgment itself it constituted no bar.

In view of the facts in the case of *Feeney v. Hinckley* the remarks of the Supreme Court to the effect that cases might arise where, for certain purposes a judgment may be evidentiary, were pure *dicta*, but in any event, in view of the opinions which gave rise to them, by no stretch of the imagination could the judgment in the instant case at date of bankruptcy be held to be one of the exceptions to the general rule of the state recognized and affirmed in *Feeney v. Hinckley*.

"The general rule undoubtedly is that until a judgment becomes final by affirmance on appeal, or by the lapse of the time within which an appeal might be taken, such judgment is not admissible in evidence and cannot be relied upon as the foundation of rights declared in it."

Sewell v. Price, 164 Cal. 265, 270.

The above action was a creditor's bill based on a judgment which was objected to as not being final. The court, in considering the matter, used the language above quoted, but held that the rule had no application to the case at bar, as all that was required of the creditor in such case was to put himself in a position to levy execution. The fact that the time for appeal had not expired not preventing the issuance or levy of execution under a money judgment, it was accordingly held that in the absence of an undertaking preventing the execution from issuing a plaintiff who had recov-

ered a judgment might maintain a creditor's bill, notwithstanding the fact that the time for an appeal had not expired, or an appeal had actually been taken and was pending.

Two of the California federal courts have had occasion to consider the question of the force and effect of a judgment from which an appeal was taken, namely, *Contra Costa Water Co. v. City of Oakland, supra*, and *in re Yates*, 114 Fed. 365, 8 A. B. R. 70. In the first case on page 529 of the opinion, Judge Gilbert uses the following language:

"No suggestion is offered to impeach the conclusiveness of that adjudication except the fact that defendants have appealed from it. In some states, and perhaps by the weight of judicial decisions generally, it is held that, where the power of an appellate court is confined to the affirmation, reversal or modification of a judgment, order or decree which is appealed from, the appeal and *supersedeas* merely operate to stay execution and other final process upon the judgment, and that either party may invoke it as an estoppel. In other states, however, it is held that perfection of an appeal suspends the judgment for all purposes and deprives it of its effect as an estoppel. It is so held by the decisions of the Supreme Court of California."

In the above case Judge Gilbert denied the judgment the effect of an estoppel, but considered it on application for a restraining order as "of persuasive force as evidence" in enabling the court to exercise its judicial discretion in allowing or withholding the order asked for. A far different situation from its use on the

merits as a full, complete adjudication of the rights of the parties which the judgment in the present case is attempted to be used for.

In the case of *in re Yates, supra*, a motion was made to vacate the decree of the court adjudicating Yates bankrupt upon his voluntary petition, and for the dismissal of the petition. The only debt mentioned in the schedule filed with the petition being described as a judgment in favor of Risdon, the moving party, for the sum of \$894.00, which judgment was obtained in an action for a wilful, malicious injury to the person of Risdon. After the rendition of the judgment and before the adjudication in bankruptcy an appeal was taken which was pending at the time of the hearing of the motion, the court considering the force and effect of the judgment under the codes of California and state decisions, granted the motion "because, at the date of the filing of his voluntary petition, there was no existing, provable claim against his estate, under the Bankruptcy Act."

The court below in its opinion in the instant case [Tr. 38 *et seq.*] criticises the doctrine laid down in *Feeney v. Hinckley*(*supra*), and the cases cited in it, and in support of the statement made in the opinion [Tr. 39] that the great weight of authority is to the contrary, cites the following cases, viz.: *Taylor v. Shew*, 39 Cal. 536; *Dowdell v. Carpy*, 137 Cal. 338; *Rogers v. Superior Court*, 126 Cal. 183; *Cook v. Rice*, 91 Cal. 668, and *Dore v. Southern Pacific Co.*, 163 Cal. 195.

The case of Dore v. Southern Pacific Co. is one in which, with other evidence as to the title to land, certain judgments under the McEnerney Act of 1906 were introduced determining that the plaintiffs were the owners of the properties. Regarding the judgments, the court says on pages 194 and 195:

"The said judgments would have become final, by expiration of time for appeal, before the findings were signed, and, as no showing was made to the contrary, we must presume that there was no appeal and that they were competent evidences of title during the continuance of the trial, which, in legal contemplation, continued until the decision of the court below was made. There was no attempt whatever, by the defendant, on the trial, to show affirmatively any defect in plaintiffs' title. From all these facts and circumstances the court could reasonably infer that the plaintiffs were the owners of the land at the time the contract was made and thereafter until the time of trial. We think the evidence was sufficient to sustain the finding as to title. The ruling admitting in evidence the aforesaid judgments before they became final seems to be in accord with Cook v. Rice, 91 Cal. 668, and contrary to Naftzger v. Gregg, 99 Cal. 88 (37 Am. St. Rep. 23, 33 Pac. 757). The error, if any, was harmless, since they became final before the trial was closed."

The court there called attention to the fact that Cook v. Rice is not in harmony with the later case of Naftzger v. Gregg, *supra*, but refused to assign error because of the admission of the judgments as there was no prejudice by reason thereof. This case also is cited in the opinion of the learned judge in the court below

in the instant case as authority for postponing action on a claim based on such a judgment until final disposition is made of the case by the Supreme Court. He evidently did not observe the distinction between the pendency of the bankruptcy as a proceeding and the date of the filing of the petition as date on which a claim must be provable in bankruptcy if it is to participate in the assets of the estate. That is the date when the bankrupt's property comes into the custody of the court for the benefit of those only who hold provable and allowable claims at that time, and from whose debts he is discharged, and the creditors' rights are determined by the status of his claim at that time.

"On that date the property of the bankrupt passes from his control to the court or to its receiver, and thence to the trustee in trust for the creditors of the bankrupt in proportion to the amounts of their claims at that time. On that date there vests in each creditor as a *cestui que* trust an equitable estate in such a part of the property of the bankrupt as the amount of his provable claim at that time bears to the entire amount of the provable claims against the estate. On that date the bankruptcy law deprives the creditor of all his common-law remedies to collect his debt out of the property of his debtor and to collect subsequent interest on his claims against that property, and gives him in lieu thereof this equitable estate in the property of the bankrupt. Thus the filing of a petition upon which a subsequent adjudication of bankruptcy is rendered places all the property of the bankrupt 'which prior to the filing of the petition he could by any means have transferred

or which might have been levied upon and sold under judicial process against him' in *custodia legis*. Section 70a (5), 30 Stat. 566 (U. S. Comp. St. 1901, p. 3451). From that hour the bankrupt is divested of the power to appropriate it to the payment of his debts or to use and dispose of it at will, and that authority is vested in the District Court. Every suit against him upon a provable claim is stayed from the date of the filing of the petition. Section 11a, 30 Stat. 549 (U. S. Comp. St. 1901, p. 3426). Every person is forbidden to receive from the bankrupt any material amount of property after that date with intent to defeat the act. Section 29b, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433). Every intentional preference after that date is voidable. Section 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445). Upon the filing of the petition the court may take immediate possession of the property if the bankrupt is neglecting it so that it is deteriorating in value. Section 69a, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450). And upon the appointment of the trustee all the property of the bankrupt which, prior to the filing of the petition, he could have transferred, or which could have been seized or sold under judicial process against him, passes to this officer of the court. Section 70a (5). Indeed, the condition at the time of the filing of the petition measures the extent of the estate and the rights of all creditors of the bankrupt and all parties interested in the property throughout all the provisions of the law. Sections 1 (10), 3b, 9b, 29b (4), 63a (1), 30 Stat. 544, 546, 549, 554, 562 (U. S. Comp. St. 1901, pp. 3419, 3422, 3426, 2447)."

Board of Com'r's v. Hurley, *supra*.

The case of Taylor v. Shew is in conflict with the later California cases and absolutely opposed to the provisions of the Practice Act of that time, now embodied in sections 577 and 1049 of the Code of Civil Procedure, upon which such later cases base their decisions, and we submit should not be considered by the federal courts as an authority in determining this question. The learned judge below admits in his opinion that the case is in conflict with that of Feeney v. Hinckley and cases cited therein.

Cook v. Rice is distinguished by the court itself from the instant case. On page 668 of the opinion the court says (italics ours) :

“It was enough that the judgment was in force, *not suspended by an appeal* or otherwise, and that while in force, it finally disposed of the controversy.”

As stated before, this case is also in conflict with the later cases which must be taken as the law of the state.

Rogers v. Superior Court of Riverside County was an application for a writ of mandate commanding the Superior Court of this county to entertain a motion of petitioner to vacate and set aside an injunction granted by decree in a case then on appeal. Such a motion was held to be a “proceeding in the court below upon the judgment” appealed from, which was stayed by Sec. 946, Code of Civil Procedure. This case would not seem to be pertinent to the question here.

In the case of Dowdell v. Carpy it was stipulated that a judgment pleaded as a counter-claim

“shall be treated and considered for all purposes of set-off or counter-claim * * * and all objections to said decree as a counter-claim herein for said amounts, so far only as objection has been or may be made upon the grounds that it is a decree for the foreclosure of a mortgage, and that the sale directed thereby has not been made, and a deficiency judgment entered therein, is hereby waived.”

In view of such a stipulation, the language quoted from the opinion of Dowdell v. Carpy by the learned judge below [Tr. 40] would seem to have no place in the opinion, and such case could not be an authority on the question involved here. Dowdell v. Carpy is the more recent California decision referred to by the court below in its criticism of Feeney v. Hinckley.

A single decision of a state court which departs from the whole course of the decisions of that state, will not be followed.

Hardin v. Jordan, 140 U. S. 371, 380.

And if there be any inconsistency in the opinion of the state courts, the federal courts will follow the latest settled adjudication in preference to the earlier ones.

Wade v. Travis County, 174 U. S. 508.

A division of opinion between the members of the state Supreme Court, although a close one, does not prevent the opinion from becoming the decision of the court, and as such conclusive upon the federal courts.

Williams v. Eggleston, 170 U. S. 311.

And in determining what the law of the state is, mere *dicta* in an opinion of a state court is not to be considered.

Matz v. Chicago etc. R. Co., 85 Fed. 180;

Hardin v. Jordan, 140 U. S. 371;

Southern R. Co. v. Simpson, 131 Fed. 705;

Lyman v. Hilliard, 154 Fed. 331.

In view of the well-established principles of law above stated, the authorities cited by the court below in its opinion would seem not to be pertinent to the question here involved, and we contend that under the law of this state the claim of C. K. Douglas at the date of filing of the petition was not a fixed liability, absolutely owing. The judgment upon which it was based was subject to modification or reversal. No action could have been based upon it. It had no value as evidence of the facts stated therein. It was not *res adjudicata* as between the parties, nor of any validity as a bar, and was in fact not a judgment at all so far as finally determining the rights of the parties it concerned, which is the very element necessary to make it fixed and absolute in this case.

By reason of the foregoing, we respectfully submit that the order and judgment appealed from should be reversed and the order of the referee affirmed.

Dated January 22nd, 1916.

W. T. CRAIG AND CARROLL ALLEN,
BENJAMIN E. PAGE, DAVE F. SMITH,
Attorneys for Appellant.



No. 2665.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

Wm. H. Moore, Jr., Trustee in
Bankruptcy of the estate of Ber-
lin Dye Works & Laundry Com-
pany, a corporation, bankrupt,
Appellant,
vs.
C. K. Douglas,
Appellee.

Filed
FEB 7 - 1916
F. D. Monckton
clerk

BRIEF OF APPELLEE IN ERROR.

E. B. DRAKE,
Attorney for Appellee.

No. 2665.

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BRIEF OF APPELLEE IN ERROR.

STATEMENT OF THE CASE.

(Numbers refer to page of Transcript.)

(*Italics ours unless otherwise indicated.*)

We believe that, for the purpose of clarity in a discussion of the matter hereinafter attempted, it is proper that we make a chronological statement of the steps in the case, which are as follows, to-wit:

- (a) July 11th, 1913, judgment for \$10,000.00 damages was rendered in the Superior Court, Los Angeles

county, state of California, in favor of C. K. Douglas and against the bankrupt [pp. 3 and 4].

(b) September 10th, 1913, the bankrupt appealed from the judgment to the Supreme Court of the state of California.

NOTE: Bankrupt proceeded with said appeal without order of referee; executed a cost bond in the sum of \$300.00; but did not execute a *supersedeas* bond as provided in the Code of Civil Procedure of California, section 942 [p. 12].

(c) October 7th, 1913, judgment of bankruptcy was entered herein, upon petition filed September 15th, 1913 [p. 12].

(d) February 14th, 1914, claim of C. K. Douglas, based on a duly certified copy of said judgment, filed before referee [p. 13].

(e) April 17th, 1914, stipulation filed and motion made to advance and submit said appeal in the Supreme Court, which was done [p. 13].

(f) April 21st, 1914, the claim of Douglas presented to the referee for allowance; oral objection was made thereto, and the referee by order declared a dividend thereon, but suspended payment [p. 13].

(g) June 23rd, 1914, formal written objection filed on behalf of trustee to the claim of Douglas.

(h) December 17th, 1914, said judgment of lower court in said appeal duly affirmed by the Supreme Court of this state, becoming final January 16th, 1915, as shown by affidavit of E. B. Drake filed January 18th, 1915 [p. 9]. (Reported in 169 Cal. at p. 28.)

(i) February 1st, 1915, hearing on question of allowing the claim of Douglas before referee.

On Apr. 6, 1915, referee refused allowance of Douglas' claim [p. 14].

On July 6, 1915, referee's decision was reversed by Judge Oscar A. Trippett, U. S. district judge [p. 38].

POINT I.

The Claim of Douglas was a Provable Claim Sept. 15, 1913.

We contend that the claim of Douglas was in no sense an "unliquidated claim for tort" or an "unliquidated claim" upon anything Sept. 15, 1913, but, on the contrary, was at that time a "*liquidated*" claim, as shown by a certified copy of judgment A.

Definition of Black's Law Dictionary thereof:

"Unliquidated damages are such as are not yet reduced to a certainty in respect of amount."

"Liquidated damages is applicable when the amount of the damages has been ascertained in the judgment in the action."

"Liquidated: Ascertained, fixed, settled."

We do not believe it will be seriously contended that a claim, whether arising *ex contractu* or *ex delicto*, is not a liquidated one when a judgment has been rendered thereon fixing the amount in dollars.

Learned counsel for appellant argue that "in California a judgment from which an appeal is pending, or the time for appeal has not expired, is no judgment." The only effect an appeal has upon a judgment is, we contend, that it may not be received in evidence as long as it is pending on appeal, but we do not understand the decisions cited to hold that a judgment appealed from is *no judgment*.

The cases cited by counsel merely hold that the judgment is not receivable as evidence—that is, by reason of appeal it has lost its *probative* force—held in abeyance *pro tempore*.

Section 942, Code of Civil Procedure of this state, provides:

“If the appeal be from a judgment * * * directing the payment of money, it does not stay the execution of the judgment * * * unless a written undertaking be executed on the part of appellant. * * *”

From this it would seem that the judgment is very much alive pending the appeal and the mere matter of appeal does not, *per se*, wipe out the judgment altogether.

It is a rather anomalous position, it seems to us, to assume that an appeal, which does not satisfy or suspend the collection of the judgment, would, however, make the claim based thereon *non-provable*.

Learned counsel's statement that the judgment was “not provable in bankruptcy” because it was “an unliquidated claim for tort,” is wrong as to premise and the matter falls because it was not at the date of bankruptcy “an unliquidated claim for tort” and was not in any sense “unliquidated,” but, on the contrary, was *liquidated*.

We might say that it is fundamentally true that the competency of evidence is considered as of the date it is offered, then certainly the judgment in this case on February 1st, 1915, was competent evidence, *prima facie* of all recitations therein; if so, on that date we had not

only a *provable*, but a *proved* claim, and it is immaterial whether it could be proved at the date of bankruptcy or not, because the claim of Douglas was in no sense considered to make the number or amount that is required under the Bankruptcy Act of 1898, upon which the adjudication was made.

The *Yates* case (8 A. B. R. 69), cited by counsel, was determined on motion of one Risdon to vacate the decree of the court by which one Yates was upon his voluntary petition theretofore adjudged a bankrupt. The only debt mentioned in the schedule filed with the petition is described as a judgment in favor of Risdon for \$894.00 in the Superior Court of Napa county. The ground of the motion was that Yates is not a bankrupt, because there was no other debts against him than this. *It appeared upon the hearing of the motion that the judgment was obtained in an action for wilful and malicious injury to the person of Risdon. After its rendition and before the decree of adjudication in bankruptcy, an appeal was taken from the judgment to the Supreme Court of the state and that the appeal was then pending.*

It is necessary for a bankrupt to owe something before he can be adjudged a bankrupt, for this is included in the very definition of the word "bankrupt." The judgment was not provable—that is, was not capable of being proved at the time of adjudication of bankruptcy, because a judgment is only *provable* by the profert thereof, or by a duly certified copy thereof; therefore, it follows *In re Yates* that when the adjudication of bankruptcy was had there was no claim of

Risdon's that could have been *proved* for lack of legal evidence.

This might be analogous to the case at bar, if the referee had decided, when the claim was filed at the first hearing before judgment became final, that appellee had no claim because he *could not prove it* under the rule of evidence in California, that a judgment must be proved alone by an exemplification thereof.

The reasoning of Judge DeHaven *In re Yates* was that it would produce an anomalous condition of record to adjudge a man a bankrupt while the judgment which rendered him an insolvent was pending on appeal, which might be reversed by the Supreme Court; this was probably the reason for the language used at the foot of said opinion as follows (p. 71):

“It will be time enough for him to apply for relief under the Bankrupt Act and to ask the court to pass upon the many questions which may arise in such proceeding, when it shall be ascertained that he is indebted to some person upon a claim provable under the Bankrupt Act.”

His Honor *In re Yates* used this language:

“* * * but a cause of action against him for unliquidated damages for a personal tort, such as is involved in the action of Risdon v. Yates before referred to, is not within either of the classes named.”

Respectfully, we suggest (not in criticism) that this language, *supra*, must have been used inadvertently by the learned court in discussing this question.

We are unable to see why a judgment which was

merely appealed from could be called “a cause of action for unliquidated damages for a personal tort,” if it is considered Judge DeHaven so meant. This would be legally true if applied to the cause of action before the judgment was rendered thereon, *but not so after the rendition of judgment.*

“Liquidation” does not mean any more than the word “final,” but probably as much, and that is what a judgment is called in California entered in a case like the one at bar, whether appealed from or not.

Code of Civil Procedure, sec. 950.

In re Yates (p. 70), quoting:

“It has been repeatedly held by this court that the operation of a FINAL JUDGMENT * * *,” referring to the judgment pending appeal.

We are unable to understand how it can be said, either legally or academically, that a final judgment is *unliquidated*.

It must also be noted *In re Yates* that the judgment under discussion was one for “*wilful and malicious injury to the person of Risdon*,” and was not a debt or judgment from which the bankrupt under any state of case could be discharged.

Bankruptcy Act, section 17, among other things, provides that a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as are

“2. * * * for *wilful and malicious injuries to the person or property of another*.”

It would, therefore, appear to anyone, not necessarily a logician, that if the Risdon judgment under consideration in *In re Yates* was not one from which he could be discharged, it was not one that would be provable whether the judgment was final or not.

As a basis for the opinion of *In re Yates*, it further appears (p. 71) that *In re Maples* (105 Fed. Rep. 919) is cited as authority for the ruling in that case. From an examination of that case it appears that the seduction of a female is held to be "*wilful and malicious injury to the person*" within the meaning of the Bankruptcy Act of 1898, section 17a, sub-section 2, from which the defendant could not be released by discharge in bankruptcy, and, therefore, a voluntary petition on his part to be made a bankrupt, which scheduled no other claim, is not sufficient, because it is not a provable debt.

In re Hirschman (104 Fed. Rep. 69) is referred to *In re Yates* as authority, referring to the well-considered opinion of Judge Marshall therein.

There is nothing, we think, in that case that holds that a *judgment* was an "*unliquidated action for tort*," but, on the contrary, the opposite appears, and the learned opinion cannot be read by one without forcing the reader to that conclusion, and without quoting therefrom the court's attention is particularly invited to the bottom of page 70 and top of page 71, in which it is virtually held that where damages have been reduced to a judgment before the adjudication that it is a provable debt, making the exception, however, of *wilful injuries to person*.

Further, it appears in *In re Yates* that there was but one claim scheduled, to-wit, a judgment for "wilful and malicious injury to the person of Risdon," and from which the petitioner for bankruptcy could not be discharged, and the court merely held that it would be a work of supererogation on the part of the court to adjudge a man a bankrupt for the purpose of discharging him against a debt which was not dischargeable.

The court will also note that the reference in Judge DeHaven's opinion just under consideration as to a provable debt at the time of the filing of the petition could have no authoritative effect here, for he was discussing a jurisdictional question which was applicable to that particular situation and no other. It must appear that there was a provable or dischargeable debt existing at the time of the filing of that petition, while in the case at bar Douglas' claim was in no sense a part or parcel of the original petition for involuntary bankruptcy of this bankrupt.

We suggest that *Stockwell v. Woodward*, 52 Vt. 228, is a case more nearly in point. The syllabus:

"A discharge in bankruptcy is not a bar to a debt for costs taxed pursuant to a judgment for costs alone where the judgment is rendered and the costs are taxed after the filing of the petition, although the action was begun before the filing."

We concede that costs accrued after the filing of the petition for bankruptcy would not be provable part of a claim, and the court will note that we have not included our costs in the Supreme Court as part of our claim herein in the supplemental affidavit of counsel, filed January 18th, 1915.

In the latter part of the syllabus, under the head of *Semble* (meaning that a court might decide that if it was before it, or the reporter did not know what was decided), it might appear from casually looking at it that a judgment for tort was not a provable debt, but a full consideration of the case appears to hold otherwise. At the bottom of page 234:

“The rule is that where the action is for a tort or, as in the present case, the recovery is for costs alone * * * and final judgment is not rendered or the costs taxed until after the date of the filing of the petition, or that named in the discharge, the certificate is no bar.”

Logically, the obverse would be true.

Douglas' judgment was rendered two months before the filing of the petition herein. The difference is apparent.

In re New York Tunnel Co. (20 A. B. R. 25) it is held (at bottom of page 27):

“JUDGMENTS RENDERED BEFORE BANKRUPTCY, WHETHER BASED UPON LIABILITY FOR TORT OR CONTRACT, ARE EXPRESSLY PROVABLE UNDER SECTION 63a.”

Remington on Bankruptcy, we find in vol. I, sec. 635, page 376, the following:

“Claims *ex delicto* for money cannot be proved as such. Thus an unliquidated claim for damages for personal injury is not a provable claim and is not susceptible of being made a provable claim. ***

“BUT IF REDUCED TO JUDGMENT BEFORE THE FILING OF THE BANKRUPTCY PETITION MAY BE PROVED AS A JUDGMENT.”

It clearly appears from the above that there is a wide and well defined distinction in law between a "claim" and a "judgment."

It may be conceded that the validity of the claim would be determined as of the date of the adjudication of the bankrupt, which in this case was September 15th, 1913, two months after appellee's judgment was rendered.

Our contention is that Douglas was a creditor of the bankrupt from the date of his accident, if it may be considered that the judgment in this case (in the absence of any proof) was founded upon a tort. It must be known to this Honorable Court that a jury trial on July 11th, 1913, must have arisen from a cause of action months prior thereto; therefore, it follows that the debt or demand of appellee became and was subsisting from the date of the accrual of the cause of action.

It has been held in a case for slander that the person having a cause of action thereon is a creditor before the judgment is obtained.

Chalmers v. Sheehy, 132 Cal. at p. 465.

Quoting from the same page as follows:

"The principle has been applied to other forms of torts or causes of action arising *ex delicto*, and it is held that the injured party becomes a creditor when the cause of action accrues. (Cases cited.)"

We believe that counsel's argument on the question of "debt" as used in the Bankruptcy Act is too restricted. For instance, in the case of *Melvin v. State*, 121 Cal. at p. 24, we find the following:

“Appellant contends, however, with great earnestness that the term ‘debt created’ does not cover a case like the present. It is true that the primary definition of ‘a debt’ is a sum of money due by certain and express agreement. (3 Blackstone’s Commentaries 154.) ‘An action at law to recover a specified sum of money alleged to be due.’ (Burrill’s Law Dictionary.)

“The term ‘debt,’ however, has a much broader popular significance than the foregoing technical definition, and includes that which is due from one person to another, whether money, goods or services; that which one person is bound to pay to another, or to perform for his benefit; thing owed; obligation; liability. (Webster’s Dictionary.)”

A “debtor” is further defined in said opinion as follows:

“A debtor is one who owes anything, or who is under obligation arising from express agreement, implication of law, or from the principles of natural justice, to render and pay a sum of money to another.”

For instance, we find in the Civil Code of the state of California, section 3429:

“A debtor, within the meaning of this title (title I), is one who, by reason of an existing obligation, is or may become liable to pay money to another, whether such liability is certain or contingent.”

Same code, section 3430, is as follows:

“A creditor, within the meaning of this title, is one in whose favor an obligation exists, by reason of which he is or may become entitled to the payment of money.”

Then it would appear to our mind that Douglas had a "debt" against the bankrupt before his adjudication, and by his certain action in the Superior Court the same was liquidated into a ten thousand dollar judgment.

Counsel argue that appellee's judgment at the time of the filing of the petition in bankruptcy was not a fixed liability evidenced by a judgment "absolutely owing."

There can be no contention, it seems to us, that a judgment rendered would be "owing" where it had not been paid or superseded on appeal by a bond as provided by the Code of Civil Procedure of this state, and the only word then that could qualify the claim by which the bankrupt could escape the payment of this claim is the restricted meaning of the word "absolutely" contended for by learned counsel.

The fact that the Supreme Court of this state affirmed the judgment, holding that there were no errors therein (169 Cal. 28), determines that the matter was "absolutely owing" at the time of its rendition. While the word "absolute" may have the same meanings as contended in the definition cited by counsel, it likewise has other meanings; for instance, in Webster's Unabridged Dictionary we find as part of the definition of the word "absolute" the following:

- "1. Absolved; freed; disengaged.
- "2. Free from imperfection; complete in its own character; perfect; whole; complete."

We think that a debt or demand might be "absolutely owing" and yet a defense be filed thereto, and

an appeal from a judgment rendered thereon might be pending.

We believe that the fact that the word "instrument in writing" used in the same connection with judgment, which is modified by the words "whether then payable or not," gives some light upon the words "absolutely owing" and does not restrict its meaning to the word "finality" as applicable to a judgment in a court.

A person might at the date of the petition have given a promissory note that was not due and defense might be made thereto by the maker in a suit at law, yet it would be "absolutely owing" if it was determined by the court later that the defense was of no concern or importance, which was done in the case at bar.

It seems to us that Congress intended by the enactment of this section to provide for the contingency, where a further attack was made upon a judgment, by appeal, because this section might read:

"*I. A fixed liability as evidenced by a judgment, whether then payable or not.*"

Quoting from the opinion of the learned district judge who tried the case in answer to this proposition, we find [bottom p. 40, trans.]:

"The judgment rendered in favor of the claimant was final and created an absolute liability of the bankrupt. Notwithstanding the appeal from the judgment, it could not be reversed or modified. This is necessarily so because the judgment contained no error or infirmity upon which the Supreme Court could predicate a reversal or modification. The question is asked, however, how is this court to know whether or not it would be reversed or modified until the appeal is finally dis-

posed of? That can be ascertained by an inspection of the record, or by postponing the matter until the Supreme Court acts."

(a) The word "absolute" has various significations, which it receives in popular use. It means "complete, unconditional, not relative, not limited, independent of anything extraneous." In its signification of "complete, not limited," it is used in the law to distinguish an estate in fee from an estate in remainder.

Johnson's Admr. v. Johnson, 32 Ala. 637.

(b) The term "absolute" as used in insurance policies has been held to be synonymous with "vested" and used in contradistinction to "contingent" or "conditional."

German Fire Ins. Co. v. Stewart, 42 N. E. 286.

(c) Absolute drunkenness, within the meaning of the rule that absolute drunkenness is a defense against contracts made while in a state of absolute drunkenness, does not mean complete insensibility. A man may be absolutely drunk without being dead drunk.

Cavender v. Waddingham, 5 Mo. App. 457.

(d) An "absolute guaranty" is an unconditional promise of payment or performance on default of the principal.

White Sewing Mach. Co. v. Powell, 74 S. W. 746.

(e) An "absolute guaranty," in the law of negotiable instruments, is an unconditional undertaking on

the part of the guarantor that the maker will pay the note.

Beardsley v. Hawes, 40 Atl. 1043;
Eshberg-Bachman Leaf Tobacco Co. v. Heid, 62 Fed. 962.

(f) In a condition of policy providing that any interest in property insured, not "absolute," must be represented to the company, the word "absolute" refers to the character or quality of the estate, and is synonymous with "vested," and used in contradistinction to "contingent" or "conditional."

Wooddy v. Old Dominion Ins. Co., 31 Am. Rep. 752;

Hough v. City Fire Ins. Co., 29 Conn. 10;
Gaylord v. Lamar Fire Ins. Co., 40 Mo. 13.

(g) The term has no fixed, unvarying meaning, when used in connection with an interest in property. It is not always synonymous with "unqualified."

Washington Fire Ins. Co. v. Kelly, 32 Md. 421.

(h) An equitable title, that would be protected by a court of equity as such, may be an ownership as "absolute" as the legal title.

Gaylord v. Lamar Fire Ins. Co., 40 Mo. 13.

(i) Property is "absolute" when an external object or thing is objectively and lawfully appropriated by one to his own use in exclusion of all others.

Griffith v. Charlotte etc. R. Co., 23 S. C. 25.

(j) An "absolute sale" is one where the property in personal chattels passes to the buyer upon the completion of the bargain or treaty between the parties.

Truax v. Parvis, 32 Atl. 227.

(k) An "absolute total loss" takes place when the subject insured wholly perishes, or there is a privation of it and its recovery is hopeless.

Murray v. Great Western Ins. Co., 25 N. Y. Supp. 414.

(l) Rev. St. c. 86, sec. 55, cl. 4, providing that no trustee (garnishee) shall be charged unless at the time of the service of the writ the amount due the defendant is "due absolutely," was construed to require only that the debt should have been fully created, and did not require that the time for payment thereof had expired. Thus, where a railroad company was garnished on the 4th of June to subject an employee's pay earned in May, the company was properly charged, though by its contract with the employee the amount so earned was not payable until June 15th.

Ware v. Gowen, 65 Me. 534.

We contend that from the foregoing it would appear that a judgment, rendered two months before the filing of the petition in bankruptcy, and which it was afterwards held by the Supreme Court on appeal that there was no error therein, was "absolutely owing" at the time of the filing of such petition.

POINT II.

Appellee's Contention is that he made a Prima Facie Case which was not met by the Trustee, Otherwise the Claim is Payable.

The claim of appellee being based upon a judgment which is now receivable in evidence is *prima facie* provable and allowable, and as a matter of law was *prima facie* provable and allowable at the time that the original claim was filed. From this record it would appear that he had a claim at that time, the proof of which was merely suspended by appeal, for \$10,000.00 damages, and it does not appear in the judgment that the claim is, or was ever based upon a tort of any kind, and the word "damages" as used in the certified copy of the judgment [p. 5] could not be construed to mean in any sense a tort action, because this Learned Court will, no doubt, bear in mind that there are many actions for "damages" that are not based upon a tort for personal injuries; as a matter of fact, actions for damages for torts are but *one* small branch of the general actions at law sounding in damages; and in the absence of an affirmative showing on the part of counsel for the trustee in this record, they would now be estopped to raise that question against a *prima facie* case as shown by claimant's demand established by a final and conclusive judgment.

POINT III.

The Written Objections of the Trustee Filed Herein are not Sufficient to raise the Question Asserted in Counsel's Brief.

As we understand it, the pleadings in this proceeding are confined alone to the claim and the written objections filed thereto, which go to form the issue to be decided, and it is necessary to look thereto to determine the issue here.

The first written objection of trustee mentioned is [p. 7]:

“That said *claimant* is not entitled to prove a claim against the above named bankrupt estate.”

We suggest that this is a mere conclusion of the pleader (if anything) and would not in any sense raise an issue, and nothing is shown specifically or definitely therein as to why the claimant would not be entitled to prove a claim against the bankrupt estate; seems to refer to some *personal* inability on the part of Douglas to file a claim.

We are sure that the objection should have been so specific that it would form an intelligent legal issue upon which proof might be heard and law submitted thereon. This may appear technical, but “He that lives by the law, may die by the law.” Counsel for trustee are contending for a technical construction alone here to avoid allowance of the claim, and we have a right likewise to meet the same—if we can.

Then if specification “I” is not sufficient and is meaningless considered alone, it must be read in connection with specification “II”; then if “I” and “II” are read to-

gether, and this must be if we are to intelligently determine what is being driven at, we find that the objection is to the proof value of judgment alone (quoting) *because it "is not a final judgment, the same having been appealed from by the bankrupt and not having been decided by the Supreme Court"*; all of which is now obviated by the final decision of the Supreme Court affirming said judgment—thereby relieving its evidentiary infirmity. The objection goes to the probative infirmity of the judgment and not to the basis thereof.

There is no objection, expressed or implied, to Douglas' claim because it is (presumably) based upon a judgment for personal tort.

It is simply this way:

On the first hearing (April 21st, 1914), he offered his proof of judgment, which was orally objected to, and the matter was held in abeyance by order of referee until the state Supreme Court could pass upon the question to determine whether the judgment became final. The judgment did become *finally* final and was offered and received in evidence on the hearing February 1st, 1915, and we contend it is conclusive of all questions, thereby making the claim of Douglas provable and payable herein.

POINT IV.

A Judgment, Based upon a Cause of Action for Personal Injuries growing out of Simple Negligence, which is Rendered before the Filing of the Petition for Adjudication of Bankruptcy, is a Provable and Dischargeable Debt Against the Bankrupt Estate.

(A) It is held that a judgment growing out of a suit for unliquidated damages for breach of promise to marry against the bankrupt, is a provable and dischargeable claim, and this was based upon a judgment dated January 24th, 1900, for \$3295.80, while the defendant became a voluntary bankrupt on the 13th day of March, 1900, in the state of New York.

In re McCauley (U. S. Dist. Court E. D., N. Y. 1900), 101 Fed. Rep. 223, 4 Am. B. R. 122.

(B) *In re Lorde* (U. S. Dist. Court E. D., N. Y. 1906), 144 Fed. Rep. 320, 16 Am. B. R. 201:

By the court:

“The bankrupt Lorde had control of an apartment house. A tenant therein kept a dog. It bit a boy. Lorde was informed thereof. Thereafter the dog bit another boy. Lorde was sued for the injury. The complaint stated ‘that the defendant wrongfully and negligently suffered such dog to go at large without being properly guarded or confined.’ The plaintiff recovered judgment. The question is whether Lorde may be discharged from such judgment, and an execution against his body stayed, or was his act a wilful and malicious injury to the person within the meaning of section 17a, subd. 2 of the Bankruptcy Act of July 1, 1898. * * *

“The judgment is dischargeable in bankruptcy, and the proceedings for the arrest of the bankrupt should be stayed.”

This is exactly in point here.

(C) *In re Buchan's Soap Corporation* (U. S. Dist. Court So. D., N. Y. 1909), 169 Fed. Rep. 1017, 22 Am. B. R. 382:

“When an action on an unliquidated claim is pending in a state court at the time that bankruptcy occurs, and the receiver or trustee applies for an order to stay proceedings in such action, such an order is usually made, in view of the greater simplicity and promptness of a proceeding before the referee; *but if a trustee does not apply for a stay, and permits the case to go to judgment, in an action pending in a state court, the claim is thereby liquidated, and the judgment affords proper proof of the amount of the claim as liquidated.* * * *

If the trustee is dissatisfied with the amount of the judgment, his remedy is to apply in the state court to open the default. If no application is made, or if such an application is made and denied by the state court, I think that the proof of claim on the judgment should stand.”

Is there any difference in the legal principle announced here and in the case at bar? We think not.

(D) *In re Putman et al.* (U. S. Dist. Court N. D., Cal. 1911; by Farrington, judge; 193 Fed. Rep. 464), in our opinion, if not conclusive, is very respectable authority on the question of the allowance of a judgment, even should it be held that the Douglas judgment is for personal injuries based on tort.

On an examination of this case, *supra*, we find that the question of whether or not a judgment for personal injuries for simple negligence is a provable claim under the Bankruptcy Act of 1898, arose and was decided because the alleged bankrupt demurred to the petition therein of three creditors, contending particularly that Kate C. Putman had no provable claim because hers was based upon a judgment for ten thousand dollars growing out of injuries caused by simple negligence, or, as counsel for the trustee might call it, based on an "unliquidated claim for tort," and therefore the petition must fall because he did not have sufficient parties thereto with provable claims.

His Honor, Judge Farrington, in deciding this question, uses this language (p. 468) :

"Creditor shall include any one who owns a demand or claim provable in bankruptcy. * * *"

* * * * * * * * * * *

"(1) A fixed liability as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not * * *"

"In section 17 it is provided that a discharge in bankruptcy shall release a bankrupt from all his provable debts, with a few specified exceptions, none of which are material to this opinion.

"*We have here an unsatisfied judgment in favor of the alleged creditor, and an unpaid stock subscription against the alleged bankrupt. Each, in itself, in my opinion, is a provable claim; the first, because it is a judgment; the second, because it is founded upon a contract.*

"A fixed liability as evidenced by a judgment
* * * absolutely owing at the time of the filing

of the petition' against the bankrupt is a provable claim.

"*There is no qualification in this language indicating that Congress intended to distinguish between judgments *ex contractu* and judgments *ex delicto*.*

"Collier in the last edition of his work on bankruptcy, page 700, says that *judgments grounded in tort are, almost without exception, provable*.

"In Remington on Bankruptcy, sec. 680, it is said that '*judgments for personal injury and other similar torts not capable of being presented in form *ex contractu* are provable, although the unliquidated claims for torts themselves would not be provable.*' *In re Lorde* (D. C.), 144 Fed. 320; 1 Remington on Bank., p. 706."

POINT V.

If there was any Infirmity in the Judgment on the First Hearing on the 21st of April, 1914, That was Removed at the Last Hearing on February 1st, 1915, by the Affirmance of the Judgment on Appeal by the Supreme Court on December 17th, 1914.

Even if it is considered that under the law of the state of California a judgment that has been appealed from and not superseded prevents it from being introduced in evidence, yet the court may, and it is the practice, to suspend the hearing or defer the hearing until such infirmity is removed.

When this matter came on for the first hearing on April 21st, 1914 [trans. p. 15], and oral objections were made to the allowance of the claim, "a dividend was declared on all claims proved, but not allowed was suspended," and the hearing by consent of all parties was

delayed until the action of the Supreme Court. And to show that this was done there was a stipulation entered into [trans. p. 13], which permitted the state Supreme Court to, and it did, advance the hearing of same.

The learned judge of the District Court, in passing upon this question, used this language [trans. p. 41]:

“The question is asked, however, how is this court to know whether or not it would be reversed or modified until the appeal is finally disposed of. That can be ascertained by an inspection of the record, or by *postponing the matter until the Supreme Court acts*. *The referee pursued the latter course in this matter. This practice was approved in Bank of America v. Wheeler, 28 Conn. 433; Dawson v. Daniel, 7 Fed. Cases 3668, and by the Supreme Court of California in Dore v. Southern Pacific Company, 163 Cal. 195.*”

We believe that the learned District Court was right in allowing the claim of Douglas to be filed as allowable and provable against the bankrupt estate; therefore, that judgment should now be affirmed.

Respectfully submitted,

E. B. DRAKE,

Attorney for Appellee.

United States
Circuit Court of Appeals
For the Ninth Circuit.

GOLD HUNTER MINING & SMELTING COMPANY, *Plaintiff in Error,*
vs.
EDWARD JOHNSON, *Defendant in Error.*

Transcript of Record

Upon Writ of Error from the United States District Court for the District of Idaho,
Northern Division.

Filed

United States
Circuit Court of Appeals
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GOLD HUNTER MINING & SMELTING COMPANY, *Plaintiff in Error,*
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COMPLAINT.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON, *Plaintiff,*
vs.

GOLD HUNTER MINING & SMELTING COM-
PANY, a Corporation, *Defendant.*

COMPLAINT.

The plaintiff complains and alleges:

I.

That the plaintiff is now and at all the times hereinafter mentioned was a bona fide resident and citizen of the State of Idaho, residing at Mullan, in the County of Shoshone, in said State.

II.

That the defendant is now and at all the times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Minnesota, having its principal place of business in St. Paul, Ramsey County, Minnesota, and is now and at all of the times hereinafter mentioned was a citizen of the State of Minnesota. That the said defendant corporation has heretofore complied with all of the laws of the State of Idaho relating to foreign corporations doing business therein, and that it has filed its articles of incorporation in the office of the County Recorder of Shoshone County, Idaho, which said County of Shoshone has been

designated as the county in which its principal place of business in the State of Idaho is established, and in the office of the Secretary of State of the State of Idaho and has designated an agent upon whom service of process issued under the laws of this State may be served, namely, one Charles W. Beale, of Wallace, Shoshone County, Idaho. That said defendant has been for a long time last past and on the 17th of October, 1914, was engaged in operating a certain mining property, situated in Hunter Mining District, County of Shoshone, State of Idaho.

III.

That upon the 17th day of October, 1914, and prior thereto, the plaintiff was in the employ of the defendant as machineman, engaged in working in its mine near Mullan, in Hunter Mining District, Shoshone County, Idaho.

IV.

That the plaintiff was working on the 400-foot level, so-called, of the defendant's mine, and that the accident to plaintiff hereinafter described occurred while the plaintiff was on night shift on the 17th day of October, 1914. That the plaintiff went to work on the night shift of said day about five o'clock in the afternoon and went to the place where he had been directed to work by the shift boss of the defendant on the 400-foot level. That in operating the machine drill which had been furnished to the plaintiff by the defendant, and which it was the plaintiff's duty to operate, the plaintiff found that the said drill was out of repair and in bad order,

and it thereupon became the duty of the plaintiff under instructions theretofore received from the defendant when his said Hammer drill became out of order, to take the said drill down and to carry it to the level and along the level to the shaft and thence to the main station in the mine on a higher level and exchange it for another drill.

V.

That the plaintiff was working upon what was known as the fourth floor above the 400 level and towards the west end of said floor in said stope; that working with plaintiff was another man, a mucker, by the name of Holme; that the said floors are numbered upward from the level and in order to reach the shaft it was necessary to go down from one floor to the other of the said 400 level. That man-ways had been at some time previously provided and constructed for reaching the floors above the said 400 level and that along said man-ways, and for the purpose of permitting the employees of the defendant to go from the level to the floors above ladders were constructed and installed; that in the said stope there were two man-ways, one of which extended from the 400 level in the westerly end of the stope upward to the third floor, the other one extended from the 400 level toward the easterly end thereof up to the fourth floor. That the man-way in the westerly end of the said stope had not been extended to the fourth floor, and because of a large chute extending from the third floor down to the 400 level, and a slide chute from the bottom

of the third floor to the fourth floor which covered the width of the floors, and because of the opening at the top of the said chute on the floor of the third floor and a large broken floor area around the same it was impossible for the plaintiff from the place where he was working, to reach the man-way in the westerly portion of said stope, and the only way to reach the said 400 level was downward in the easterly end of the stope and east of the said large chute. That the stope on the said fourth, and on the third, and on the floors below had been extended somewhat easterly from the said man-way and the face of the solid ground on the east extended somewhat beyond the timbering on said floors. That the ordinary method of going from the fourth floor down to the said 400 level would be by the said man-way in the easterly end of said stope. That the plaintiff, after taking down his machine, took said machine over to the said man-way and down from the fourth floor to the third floor by the said ladder; that the ladder from the second floor to the third floor had been broken by a fall of rock a short time before the accident to the plaintiff, not to exceed two or three days, and at the time of the accident to plaintiff had not been repaired or replaced by the defendant and there was not means of going by the said man-way from the said third to the said second floor; that the only way of going from the third floor to the second floor in said east end of the stope was by way of a plank or lagging eight inches in width which had been laid by the defendant from the said floor at the easterly end thereof and over to the

solid face of the stope, and walking along the said plank from the said third floor to the face of the stope and in an easterly direction, and then back in a westerly direction along the slope of the face of the stope to the said second floor; that the said lagging was simply an eight-inch plank laid from the said third floor over to the said face of the stope and was inclined downward from the third floor at an angle toward the face; the said lagging was unsecure, was not nailed or wedged and no rails were constructed along the sides thereof and no guards whatever provided, or rope or other hand pole provided. That beneath the said lagging or plank the second floor had not been timbered out to the solid ground but there was an opening from the said lagging or plank downward to the first floor or to the solid ground which constituted the face of the stope on the first floor; that the plaintiff, having no other way provided by the defendant, proceeded along the said third floor to the said lagging or plank, and while walking on the same and because of the negligence and carelessness of the defendant in providing such unsafe, inadequate way, the plaintiff either slipped from the said lagging, or the said lagging turned slightly, throwing the plaintiff off of the same and downward approximately 20 feet to the said first floor with the said heavy steel drill falling on top of the plaintiff and across his back. That there was some dripping of water in the said mine in the face of the stope and the said lagging had been permitted by the defendant to become somewhat wet, moist and slippery; that as a result of the said fall

this plaintiff was injured as hereinafter more particularly set forth.

VI.

That the shift boss of the defendant company in charge of the said stope and in charge of this plaintiff was one Steve Shaw; that it was the duty of this plaintiff to perform such work, and at such place and in such manner as the said Steve Shaw directed. That the said shift boss had under his charge other employes of the defendant including timbermen and miners and muckers; that one of the duties of said shift boss was to cause such repairs to be made as were necessary to keep and maintain the places where the employes of the defendant were required to work in a reasonable, safe condition and to make such inspections as were reasonable and necessary in the performance of the business of the defendant. That on the shift before that upon which the plaintiff was injured this plaintiff called the attention of the said shift boss, Steve Shaw, to the fact that the said ladder above referred to, between the second and third floors, had been broken and that it was necessary to repair the same; that the said shift boss thereupon stated to this plaintiff and promised this plaintiff that he would cause the same to be repaired and replaced and that he would speak also to the foreman of the mine about it and that it would be replaced and repaired, and gave to this plaintiff assurance to that effect, and the said shift boss stated to plaintiff that he should use the way which the plaintiff was going at the time of his

injury until the said ladder was replaced and the man-way repaired. That the plaintiff, relying upon the said promise of the said shift boss of the said defendant to repair the said man-way and to replace the said ladder, continued in the employ of the defendant up to the time of his injury.

That it was no part of the duty of this plaintiff to repair any such ladder or to replace the same, and the repair of the same would not have been within the scope of the plaintiff's employment or duties.

VII.

Plaintiff further alleges that the defendant was negligent and careless in leaving the said openings beneath the said plank and way untimbered and insecure, and plaintiff alleges that the said way which this plaintiff was required to go was insufficiently and inadequately protected and timbered. That the said defendant negligently, carelessly and wrongfully failed and neglected to discharge its duties to this plaintiff as its employee in the respects hereinbefore set forth.

VIII.

Plaintiff further alleges that the said defendant had full and express knowledge of the condition of said man-way and the said way which the plaintiff was required to go at the time of his injury, and of the fact that said way so provided was unsafe and insecure. Plaintiff further alleges that it would have required but a very short time to have constructed a ladder to extend from the said second floor to the

third floor, and to have nailed the same up, or secured the same in some proper manner.

IX.

Plaintiff further alleges that the said defendant owed to the plaintiff the duty to furnish a reasonably safe place in which to go to and from his work and from the place where he was working to the place where he could exchange his said machine; that the defendant was negligent and careless in furnishing said unsafe way and in not replacing the said ladder after the same had been called to its attention and permit the said man-way to become so out of repair as to be impassible for this plaintiff.

X.

Plaintiff alleges that prior to the 17th day of October, 1914, the plaintiff was a strong, able-bodied, healthy man of the age of 33 years with a life of expectancy of over 33 years, was in the possession of all his faculties, a competent laborer capable of earning Four Dollars (\$4.00) per day; that the plaintiff was a shaft miner and during a large part of the year was employed at Four Dollars (\$4.00) per day and always earned Three and 50-100 Dollars (\$3.50) per day and in excess thereof.

XI.

That because of the negligence and carelessness of the defendant as hereinbefore stated, and without fault or negligence on the part of the plaintiff the said plaintiff was injured as hereinbefore stat-

ed, was crushed and bruised and sustained a severe contusion of the muscles and an injury to the ligaments of the right sacro-iliac joint and the muscles and ligaments of the lower part of the spinal column and in and about the same, and the said plaintiff became bruised and wounded in his back and has been for a long time weak and sore, during which time he has suffered tormenting pains and endured great mental and physical pain and anguish, and has continued to suffer therefrom and will continue to suffer therefrom during the remainder of the plaintiff's life. That the plaintiff has been rendered a cripple and has at all times since said injury suffered great and severe pain; that his nerves have been affected and his entire nervous system shocked and injured and the nerves of his limbs have been affected. That in addition to the right side being particularly weak and disabled plaintiff has also suffered an injury to the left side of his back, both his right and left leg have become weak and the nerves thereof permanently affected until the said both legs and the muscles thereof are weak and the normal functions of his said legs have been permanently injured and affected. That as a result of said injuries his entire nervous system has been severely shocked and particularly the nerves in and about the said joint and extending into his legs. That the said plaintiff is weak and has been unable to do or perform any labor since said injury.

That the said wounds so wrongfully, unlawfully, negligently and carelessly inflicted upon the plaintiff by the defendant and the said injuries resulting

therefrom are permanent and have and will permanently disable the plaintiff and prevent the plaintiff from performing manual labor or attending to any business which he was capable of performing prior to his injury.

XII.

That by reason of the matters and things hereinbefore alleged and by reason of the injuries, wounds and bruises suffered by the plaintiff, and by reason of the permanent character and nature thereof and the disabilities caused to the plaintiff by the said defendant as herein alleged, and by reason of the injury to the said joint and the muscles and ligaments in and about the right sacro-iliac joint and the muscles and ligaments of the lower part of the spinal column, and by reason of the pain heretofore caused to the plaintiff and which the plaintiff will hereafter continue to suffer, and because of the permanency of said injuries and their effect upon the plaintiff's ability to perform manual labor and to earn a living the plaintiff has been damaged in the sum of Thirty Thousand (\$30,000.00) Dollars.

Wherefore, Plaintiff prays judgment against the said defendant for the sum of Thirty Thousand (\$30,000.00) Dollars and for his costs and disbursements herein expended.

JOHN P. GRAY,
Coeur d'Alene, Idaho;
WALTER H. HANSON,
Wallace, Idaho,
Attorneys for Plaintiff.

State of Idaho,
County of Shoshone.—ss.

Edward Johnson, being first duly sworn, on his oath deposes and says:

That he is the plaintiff above named; that he has read the foregoing complaint and knows the contents thereof, and that he believes the facts therein stated to be true.

EDWARD JOHNSON.

Subscribed and sworn to before me this 3rd day
of April, A. D. 1915.

Endorsed: Filed April 5, 1915. A. L. Richardson, Clerk. By Lawrence M. Larson, Deputy Clerk.

DEMURRER.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON, Plaintiff,
vs.

GOLD HUNTER MINING & SMELTING COMPANY, a Corporation, Defendant.

Demurrer.

Comes now the defendant and demurs to plaintiff's complaint herein and for grounds of demurrer alleges:

That the said complaint does not state facts sufficient to constitute a cause of action.

JAMES A. WAYNE,
Attorney for Defendant,

Residence and postoffice address, Wallace, Idaho.

Endorsed: Filed April 26, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

AMENDED COMPLAINT.

In the District Court of the United States for the District of Idaho, Northern Division.

EDWARD JOHNSON, Plaintiff,
vs.

GOLD HUNTER MINING & SMELTING COMPANY, a Corporation, Defendant.

Amended Complaint.

The plaintiff files this his amended complaint and alleges:

I.

That the plaintiff is now and at all the times hereinafter mention was a bona fide resident and citizen of the State of Idaho, residing at Mullan, in the County of Shoshone, in said State.

II.

That the defendant is now and at all the times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Minnesota, having its principal place of business in St. Paul, Ramsey County, Minnesota, and is now and at all of the times hereinafter mentioned was a citizen of the State of Minnesota. That the said defendant corporation has heretofore complied with all the laws of the State of Idaho, relating to foreign corporations doing business therein, and

that it has filed its articles of incorporation in the office of the County Recorder of Shoshone County, Idaho, which said County of Shoshone has been designated as the county in which its principal place of business in the State of Idaho is established, and in the office of the Secretary of State of the State of Idaho and has designated an agent upon whom service of process issued under the laws of this State may be served, namely, one Charles W. Beale, of Wallace, Shoshone County, Idaho. That said defendant has been for a long time last past and on the 17th day of October, 1914, was engaged in operating a certain mining property, situated in Hunter Mining District, County of Shoshone, State of Idaho.

III.

That upon the 17th day of October, 1914, and prior thereto, the plaintiff was in the employ of the defendant as machineman, engaged in working in its mine near Mullan, in Hunter Mining District, Shoshone County, Idaho.

IV.

That the plaintiff was working on the 400-foot level, so-called, of the defendant's mine, and that the accident to plaintiff hereinafter described occurred while the plaintiff was on night shift on the 17th day of October, 1914. That the plaintiff went to work on the night shift of said day about five o'clock in the afternoon and went to the place where he had under instructions theretofore received from the de-

fendant on the 400-foot level. That in operating the machine drill which had been furnished to the plaintiff by the defendant, and which it was the plaintiff's duty to operate, the plaintiff found that the said drill was out of repair and in bad order, and it thereupon became the duty of the plaintiff under instructions theretofore received from the defendant when his said Hammer drill became out of order, to take the said drill down and to carry it to the level and along the level to the shaft and thence to the main station in the mine on the higher level and exchange it for another drill.

V.

That the plaintiff was working upon what was known as the 4th floor above the 400 level and toward the West end of said floor in said stope; that working with plaintiff was another man, a mucker by the name of Holme; that the said floors are numbered upward from the level and in order to reach the shaft it was necessary to go down from one floor to the other of the said 400 level. That man-ways had been at some time previously provided and constructed for reaching the floors above the said 400 level and that along said man-ways, and for the purpose of permitting the employees of the defendant to go from the level to the floors above ladders were constructed and installed; that in the said stope there were two man-ways, one of which extended from the 400 level in the westerly end of the stope upward to the third floor, and the other one extended from the 400 level toward the easterly end thereof up-

ward to the fourth floor. That the man-way in the westerly end of the said stope had not been extended to the fourth floor, and because of a large chute extending from the third floor down to the 400 level, and a slide chute from the bottom of the third floor to the fourth floor which covered the width of the floors, and because of the opening at the top of the said chute on the floor, of the third floor and a large broken floor area around the same it was impossible for the plaintiff from the place where he was working, to reach the man-way in the westerly portion of said stope, and the only way to reach the said 400 level was downward in the easterly end of the stope and east of the said large chute. That the said stope on the said fourth, and on the third, and on the floors below had been extended somewhat easterly from the said man-way and the fact of the solid ground on the East extended somewhat beyond the timbering on said floors. That the ordinary method of going from the fourth floor down to the said 400 level would be by the said manway in the easterly end of said stope. That the plaintiff after taking down his machine, took said machine over to the said man-way and down from the fourth floor to the third floor by the said ladder; that the ladder from the second floor to the third floor had been broken by a fall of rock a short time before the accident to the plaintiff; not to exceed two or three days, and at the time of the accident to plaintiff had not been repaired or replaced by the defendant and there was not means of going by the said man-way from the

said third to the said second floor; that the only way of going from the third floor to the second floor in said east end of the stope was by way of a plank or lagging eight inches in width which had been laid by the defendant from the said floor at the easterly end thereof and over to the solid face of the stope and walking along the said plank from the said third floor to the face of the stope and in an easterly direction, and then back in a westerly direction along the slope of the face of the stope to the said second floor; that the said lagging was simply an eight inch plank laid from the said third floor over to the said face of the stope and was inclined downward from the third floor at an angle toward the face; the said lagging was insecure, was not nailed or wedged and no rails were constructed along the sides thereof and no guards whatever provided, or rope or other hand hole provided. That beneath the said lagging or plank the second floor had not been timbered out to the solid ground but there was an opening from the said lagging or plank downward to the first floor or to the solid ground which constituted the face of the stope on the first floor; that the plaintiff having no other way provided by the defendant, proceeded along the said third floor to the said lagging, or plank, and while walking on the same and because of the negligence and carelessness of the defendant in providing such unsafe, inadequate way, the plaintiff either slipped from the said lagging, or the said lagging, turned slightly, throwing the plaintiff off of the same and downward approximately 20 feet to the

said first floor with the said heavy steel drill falling on top of the plaintiff and across his back. That there was some dripping of water in the said mine in the face of the stope and the said lagging had been permitted by the defendant to become somewhat wet, moist and slippery; that as a result of the said fall this plaintiff was injured as hereinafter more particularly set forth.

VI.

That the shift boss of the defendant company in charge of the said stope and in charge of this plaintiff was one Steve Shaw; that it was the duty of this plaintiff to perform such work, and at such place and in such manner as the said Steve Shaw directed. That the said shift boss had under his charge other employes of the defendant including timbermen and miners and muckers; that one of the duties of said shift boss was to cause such repairs to be made as were necessary to keep and maintain the places where the employes of the defendant were required to work in a reasonably safe condition and to make such inspections as were reasonable and necessary in the performance of the business of the defendant. That on the shift before that upon which the plaintiff was injured this plaintiff called the attention of the said shift boss, Steve Shaw, to the fact that the said ladder above referred to, between the second and the third floors, had been broken and that it was necessary to repair the same; that the said shift boss thereupon stated to this plaintiff and promised this plaintiff that he would cause the same

to be repaired and replaced and that he would speak also to the foreman of the mine about it and that it would be replaced and repaired, and gave to this plaintiff assurance to that effect, and the said shift boss stated to plaintiff that he should use the way which the plaintiff was going at the time of his injury until the said ladder was replaced and the man-way repaired. That the plaintiff, relying upon the said promise of the said shift boss of the said defendant to repair the said man-way and to replace the said ladder continued in the employ of the defendant upon the time of his injury.

That it was no part of the duty of this plaintiff to repair any such ladder or to replace the same, and the repair of the same would not have been within the scope of the plaintiff's employment or duties.

VII.

Plaintiff further alleges that the defendant was negligent and careless in leaving the said opening beneath the said plank and way untimbered and insecure, and plaintiff alleges that the said way which this plaintiff was required to go was insufficiently and inadequately protected and timbered. That the said defendant negligently, carelessly and wrongfully failed and neglected to discharge its duties to this plaintiff and its employes in the respects hereinbefore set forth.

VIII.

Plaintiff further alleges that the said defendant had full and express knowledge of the conditions of

said man-ways and the said way which the plaintiff was required to go at the time of his injury, and of the fact that said way so provided was unsafe and insecure. Plaintiff further alleges that it would have required but a very short time to have constructed a ladder to extend from the said second floor to the third floor, and to have nailed the same up, or secured the same in some proper manner.

IX.

Plaintiff further alleges that the said defendant owed to the plaintiff the duty to furnish a reasonably safe place in which to go to and from his work and from the place where he was working to the place where he could exchange his said machine; that the defendant was negligent and careless in furnishing said unsafe way and in not replacing the said ladder after the same had been called to its attention and permit the said man-way to become so out of repair as to be impassable for this plaintiff.

X.

Plaintiff alleges that prior to the 17th day of October, 1914, the plaintiff was a strong, ablebodied, healthy man of the age of 33 years with a life of expectancy of over 33 years, was in the possession of all his faculties, a competent laborer, capable of earning Four Dollars (\$4.00) per day; that the plaintiff was a shaft miner and during a large part of the year was employed at Four Dollars (\$4.00) per day and always earned Three and 50-100 Dollars (\$3.50) per day and in excess thereof.

XI.

That because of the negligence and carelessness of the defendant as hereinbefore set forth, and without fault or negligence on the part of said plaintiff, the said plaintiff was injured, crushed and bruised.

That plaintiff suffered a concussion of the brain and spinal cord, a bruising and contusion of the muscles of the back, an injury to the ligaments of both sacro-iliac joints and the ligaments of the lower part of the spinal column and in and about the same. A bruising and contusion of the chest with injury to the pleura and lungs, and a fracture dislocation of the coccyx.

That as a result of said injuries he has since the date of said injuries suffered great physical pain and mental anguish and will continue to suffer therefrom during the remainder of his life.

That as a further result of said injuries he has been rendered completely impotent since the date of injury and will continue to remain impotent during the remainder of his life.

That as a further result of said injury his arms and legs have been greatly weakened and the muscles thereof are in a constant state of twitching, rendering work difficult and uncertain, and definite actions of the hands uncertain.

That the plaintiff, ever since said injuries, has suffered tormenting pains and endured great mental and physical pain and anguish, and has continued to suffer from said injuries and will continue to suffer

during the remainder of said plaintiff's life. That the plaintiff has been rendered a cripple and his entire nervous system shocked and injured and the plaintiff has been unable to do or perform any labor since said injury, and as a result thereof will be unable to do or perfom any labor in the future.

That the said wounds so wrongfully, unlawfully, negligently and carelessly inflicted upon the plaintiff by the defendant, are permanent and have and will permanently disable the plaintiff and prevent the plaintiff from performing manual labor or attending to any business which he was capable of performing prior to his injury.

XII.

That by reason of the matters hereinbefore alleged and by reason of the injuries, wounds and bruises suffered by the plaintiff, and by reason of the permanent character and nature thereof, and the disabilities caused to the plaintiff thereby, and because of the pains and anguish suffered, plaintiff has been damaged in the sum of Thirty Thousand Dollars. (\$30,000).

WHEREFORE plaintiff prays judgment against the said defendant for the sum of Thirty Thousand Dollars (\$30,000) and for his costs and disbursements herein expended.

JOHN P. GRAY,

Coeur d'Alene, Idaho.

WALTER H. HANSON,

Wallace, Idaho,

Attorneys for Plaintiff.

State of Idaho,
County of Shoshone—ss.

Edward Johnson, being first duly sworn, on his oath, deposes and says:

That he is the plaintiff above named; That he has read the foregoing amended complaint and knows the content thereof and that he believes the facts therein stated to be true.

EDWARD JOHNSON.

Subscribed and sworn to before me this 24th day of April, A. D. 1915.

HERMAN J. ROSSI,

Notary Public.

Endorsed: Filed April 27, 1915. A. L. Richardson, Clerk. By L. M. Larson, Deputy.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON,

Plaintiff.

vs.

GOLD HUNTER MINING & SMELTING
COMPANY, a Corporation,

Defendant.

ANSWER.

Comes now the defendant above named and for answer to plaintiff's amended complaint herein admits, denies and qualifies and alleges as follows:

I.

Defendant admits the allegations contained in paragraphs I, II and III of said amended complaint.

II.

Answering paragraph IV of said amended complaint defendant denies that the drill furnished plaintiff was out of repair, or was in bad order, and denies that it became the duty of the plaintiff under instructions received from the defendant, or otherwise, or that it was necessary for plaintiff to take said drill down, or to carry it to the level and along the level to the shaft and thence to the main station and exchange it for another drill, and defendant alleges that in truth and in fact said drill was in good condition and did not require any repairs whatsoever, and that it was not necessary at any time on said night of October 17th, 1914, for the plaintiff to exchange said drill for another, and denies that it was necessary for plaintiff to leave his place of work on the fourth floor of said 400 foot level at any time during said night of October 17th, 1914.

III.

Answering paragraph V. of said amended complaint defendant denies that because of a large chute, or any chute whatsoever, extending from the third floor down to the 400 foot level or elsewhere, or because of a slide chute from the bottom of the third floor to the fourth floor which covered the width of said floors, or because of the opening at the top of the said chute on the floor of the third floor, or because of a large broken floor area around the same, or for any of said causes or reasons, or for any reason whatsoever, it was impossible for the plaintiff from the place where he was working to reach the

man-way in the westerly portion of said stope, and alleges that in truth and in fact it was not only possible but was the only proper way for plaintiff to descend to the 400 foot level from the fourth floor; defendant denies that the only way to reach the said 400 foot level was downward in the easterly end of the stope and east of the said chute, and alleges that in truth and in fact the proper way to descend from the place where plaintiff was at work to the 400 foot level was down the man-way in the easterly portion of said stope to the third floor and thence in a westerly direction to the man-way at the westerly end of said stope and thence down said westerly man-way to the 400 foot level; and defendant further alleges that there was ample space and room for the plaintiff to walk past said chute and slide on the third floor, in walking from the east man-way to the west man-way and that said west man-way was provided with good, sufficient and proper ladders from said third floor downward to the 400 foot level; defendant denies that the ordinary method of going from the third floor down to the said 400 foot level was by the said man-way in the easterly end of said stope; defendant denies that the plank mentioned in said amended complaint, or any plank, had been laid by the defendant from the third floor to the face of said stope, or elsewhere; denies that in going from said third floor to said second floor it was necessary or proper for the plaintiff to walk along the said plank, or any plank from the third floor to the face of the stope in an easterly direction or otherwise, and then

back in a westerly direction along the slope of the face of said stope to the second floor and alleges that the proper way for the defendant to descend from the said third floor to the said second floor, upon finding the ladder broken in said easterly man-way from the third floor to the second floor, was by means of the ladder in the man-way at the westerly end of said stope, and not otherwise; defendant denies that an eight inch plank, or any plank, or lagging, whatsoever, had been laid by it, or by its direction, from the third floor to the face of the stope as a means of descending from said third floor to said second floor; defendant admits that some of the workmen on said 400 foot level, without the knowledge or consent of this defendant, had placed a lagging from the third floor to the face of said stope, claiming that it was easier to descend upon said plank than by means of the ladder by it provided, especially when carrying any weighty article; defendant denies that it had not provided plaintiff with any way for descending from said third floor to said second floor other than by means of said lagging, or plank; denies that it negligently or carelessly, or in any manner failed to provide a safe and adequate way for the plaintiff to descend from said third to said second floor, and alleges that in truth and in fact the said plaintiff, having safely reached the third floor as alleged in said amended complaint, could have safely descended from said third floor to said second floor by walking in a westerly direction upon said third floor for a distance of about thirty-five feet to the man-way

in the westerly end of said stope and thence down said man-way to the sill floor; defendant denies that the said lagging or plank had been permitted by the defendant, or by any one to become wet or moist or slippery and denies that said lagging was at the time of the said accident to the plaintiff wet, moist or slippery.

IV.

Answering paragraph VI. of said amended complaint this defendant denies that on the shift before the accident to the plaintiff, or at any time, or at all, the said plaintiff called the attention of the shift boss to the fact that the ladder between the second and third floor had been broken, or that it was necessary to repair the same; denies that said shift boss stated to plaintiff, or promised plaintiff that he would cause said ladder to be repaired or replaced, or that he would speak to the foreman of the mine about it, or that said ladder would be replaced or repaired, or gave plaintiff assurance to that effect, and denies that said shift boss stated to plaintiff that plaintiff should use the way which plaintiff used at the time of his said injury until the said ladder was replaced, or said man-way repaired; denies that plaintiff relied upon any promise of said shift boss to repair said man-way or to replace said ladder, or that plaintiff continued in the employ of defendant under any promise of said shift boss whatsoever.

V.

Answering paragraph VII. of said amended complaint defendant denies that it negligently or care-

lessly left any openings beneath the said plank and way untimbered or insecure, and denies that plaintiff was required to descend by means of said plank and denies that said way was insufficiently or inadequately protected or timbered; denies that defendant negligently or carelessly or wrongfully, or at all, failed or neglected to discharge its duties to the plaintiff, or its employees in any respect whatsoever.

VI.

Answering paragraph VIII. of said amended complaint, defendant denies that it ever had express knowledge, or any knowledge whatsoever of the way that plaintiff was required to descend from the third floor to the second floor by means of said plank or lagging and denies that said plaintiff was required so to descend, and denies that defendant ever had any knowledge that the way provided by it for descending from said third floor to said second floor was unsafe or insecure, and denies that said way was unsafe or insecure.

VII.

Answering paragraph IX of said amended complaint defendant denies that it was negligent or careless in furnishing an unsafe way, or in not replacing the said ladder, and denies that it did furnish plaintiff an unsafe way.

VIII.

Answering paragraph X. of said amended complaint, this defendant alleges that as to whether plaintiff was 33 years of age at the time of said ac-

cident, or as to how old plaintiff was at said time, this defendant has no knowledge or belief upon said subject sufficient to enable it to answer said allegations of said complaint and it therefore denies the same upon that ground.

IX.

Answering paragraph XI. of said amended complaint this defendant denies that plaintiff was injured or crushed or bruised or suffered any injuries whatsoever by reason of any negligence or carelessness of the defendant, and alleges that if the said plaintiff suffered any injuries by the accident set forth in said amended complaint that said injuries were suffered by reason of the carelessness and negligence of the plaintiff himself.

That as to whether the plaintiff suffered a concussion of the brain and spinal cord, a bruising and contusion of the muscles of the back, an injury to the ligaments of both sacro-illac joints and the ligaments, of the lower part of the spinal column and in and about the same; a bruising and contusion of the chest with injury to the pleura and lungs, and a fracture dislocation of the cocyx; and as to whether as a result of said injuries he has since the date of said injuries suffered great physical pain and mental anguish and will continue to suffer therefrom during the remainder of his life; and as to whether as a further result of said injuries he has been rendered completely impotent since the date of injury and will continue to remain impotent during the remainder of his life; and as to whether as a further result of said

injury his arms and legs have been greatly weakened and the muscles thereof are in a constant state of twitching, rendering work difficult, and uncertain, and definite actions of the hands uncertain; and as to whether the plaintiff, ever since the said injuries, has suffered tormenting pains and endured great mental and physical pain and anguish, and has continued to suffer from said injuries and will continue to suffer during the remainder of said plaintiff's life; and as to whether the plaintiff has been rendered a cripple and his entire nervous system shocked and injured and the plaintiff has been unable to do or perform any labor since said injury, and as a result thereof will be unable to do or perform any labor in the future, this defendant has no knowledge or belief upon said subject sufficient to enable it to answer said allegations of said complaint and it therefore denies said allegations upon that ground.

That as to whether said wounds are permanent or will permanently disable the plaintiff or prevent the plaintiff from performing manual labor or attending to any business which he was capable of performing prior to his injury, this defendant has no knowledge or information upon the subject sufficient to enable it to answer said allegations of said complaint, and it therefore denies the same upon that ground.

X.

Defendant denies that by reason of any injury, wounds or bruises suffered by the plaintiff, or by reason of the permanent character or nature thereof, or by reason of disabilities caused to plaintiff there-

by, or because of the permanency thereof, or their effect upon the plaintiff's ability to perform manual labor and to earn a living, or because of the pains and anguish suffered, or in any manner whatsoever, the plaintiff has been damaged in the sum of \$30,000.

XI.

Further answering said amended complaint and as a first affirmative defense thereto this defendant alleges: That if the plaintiff was injured at the time and place alleged in the amended complaint herein, that said injury was brought about and occasioned solely and entirely because of the carelessness and negligence of said plaintiff in not using due care and caution in respect to his work and in going from the third floor to the second floor of said stope, by means of said plank instead of going in a westerly direction on said third floor to the man-way at the westerly end of said stope and thence downward to said second floor, and not because of the carelessness or negligence or lack of due and reasonable care or caution on the part of the defendant, or on the part of any one for whom it is responsible.

XII.

Further answering said amended complaint, and as a second affirmative defense thereto: This defendant alleges that if the plaintiff was injured at the time and place alleged in his complaint, and said injury was not caused and brought about by his own carelessness and negligence it was brought about and occasioned by the carelessness and negligence of a

fellow servant of said plaintiff, and not in any degree because of the carelessness or negligence of the defendant, or the carelessness or negligence or lack of due care and caution on the part of any one for whom it is responsible.

XIII.

Further answering said amended complaint and as a third affirmative defense thereto, this defendant alleges that in entering into the employ of the defendant, it was part of the consideration for such employment and the plaintiff agreed thereto, that all risks, dangers and damages which were or might be sustained by said plaintiff in pursuing such employment as he was engaged in at the time of his injury, as alleged in the complaint were assumed by said plaintiff and that for such injury, risk or damage neither the defendant, nor any one for whom it was responsible should be liable in any degree or any extent therefor.

XIV.

Further answering said amended complaint and as a fourth affirmative defense thereto, this defendant alleges that if the plaintiff was injured at the time and place alleged in his complaint, and in the manner therein described, that the unsafe and dangerous condition of said place, and the risks to which plaintiff was subjected in passing over said plank, were open and obvious and known to and seen and appreciated by the plaintiff and that said plaintiff assumed all of the risks incident to his crossing over the said plank.

WHEREFORE, defendant prays that the plaintiff take nothing by his said action; that this action be dismissed and that defendant have judgment for its costs and disbursements herein.

JAMES A. WAYNE,
Attorney for Defendant.

Residence and postoffice address, Wallace, Idaho.
State of Idaho,

County of Shoshone—ss.

Thomas M. Wennan, being first duly sworn upon his oath deposes and says:

That he is acting for D. Repu, manager of the defendant corporation; that he has read the foregoing answer and believes the facts therein stated to be true.

THOMAS M. WENNAN,

Subscribed and sworn to before me this 26th day of May, 1915.

(N. P. SEAL.)

M. CHENOWETH,
Notary Public.

Service of the within answer is admitted this 26th day of May, 1915.

WALTER H. HANSON,
Attorney for Plaintiff.

Endorsed: Filed May 27th, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON, *Plaintiff,*

vs.

GOLD HUNTER MINING & SMELTING
COMPANY, a Corporation, *Defendant.*

AMENDMENT OF PARAGRAPH IX OF DE-
FENDANT'S ANSWER.

IX.

Answering paragraph eleven of said amended complaint, this defendant admits that by falling from said lagging plaintiff suffered the injuries mentioned and described in paragraph eleven of said amended complaint; but defendant denies that said injuries were received because, or by reason, of the negligence or carelessness of this defendant and denies that said injuries were received by plaintiff without fault or negligence on his part; and defendant denies that the said wounds, or any wounds, suffered by plaintiff, were caused or inflicted upon plaintiff by defendant wrongfully or unlawfully or negligently or carelessly or in any manner whatsoever.

WHEREFORE, Defendant prays judgment as in its answer herein.

JAMES A. WAYNE,

P. O. Address: Wallace, Idaho.

J. F. AILSHIE,

P. O. Address: Coeur d'Alene, Idaho.

Attorneys for Defendant.

Endorsed: Filed June 1, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON,

Plaintiff.

vs.

GOLD HUNTER MINING & SMELTING

COMPANY,

Defendant.

VERDICT.

"We the jury in the above entitled action find for the plaintiff and assess the damages at the sum of \$10,000.

C. D. WARNER,

Foreman."

Endorsed: Filed June 1, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON,

Plaintiff,

vs.

GOLD HUNTER MINING & SMELTING

COMPANY, a Corporation,

Defendant.

JUDGMENT.

This cause coming on regularly for trial, the respective parties hereto having appeared by their attorneys, and a jury of twelve persons were regularly and duly impaneled and sworn to try said action; witnesses on the part of the plaintiff and defendant

were sworn and examined, and after hearing the evidence and argument of counsel and instructions of the court, the jury retired to consider of their verdict and subsequently returned into court and being called answered to their names and say they find a verdict for the plaintiff as follows:

"In the District Court of the United States for the District of Idaho, Northern Division.

EDWARD JOHNSON,

Plaintiff,

vs.

GOLD HUNTER MINING & SMELTING

COMPANY,

Defendant.

We the jury in the above entitled action find for the plaintiff and assess the damages at the sum of \$10,000.

C. D. WARNER,
Foreman."

WHEREFORE, by virtue of the law and by reason of the premises aforesaid,

IT IS ORDERED AND ADJUDGED that the said plaintiff have and recover from said defendant the sum of \$10,000, with interest thereon at the rate of 7 per cent per annum, from the date hereof until paid, together with said plaintiff's costs and disbursements in this action amounting to the sum of \$129.15.

Dated this 1st day of June, 1915.

Endorsed: Filed June 1, 1915. A. L. Richardson,
Clerk. By Pearl E. Zanger, Deputy.

At a stated term of the District Court of the Uni-

ted States for the District of Idaho, held at Coeur d'Alene, Idaho, on Tuesday the 1st day of June, 1915.

Present:

HON. FRANK S. DIETRICH,
Judge.

EDWARD JOHNSON,

Plaintiff,

vs.

GOLD HUNTER MINING & SMELTING

COMPANY,

Defendant.

NO. 611.

On this day this cause came on to be heard and tried before the court and jury. John P. Gray and Walter H. Hanson, Esqs., appeared on behalf of plaintiff and James A. Wayne and J. F. Ailshie, Esqs., appeared on behalf of defendant. The Deputy Clerk under the direction of the court proceeded to draw from the jury box the names of twelve persons, one at a time, to serve as a jury in said cause. B. F. Tolbert, a person drawn from the box and sworn on voir dire was excused for cause. Adam Aulback, William Wheatley, and G. W. Buzzard, persons drawn from the box and sworn on voir dire were excused on peremptory challenge by counsel for the plaintiff. Charles Garrells, Dougal McCall and Patrick Gannon, persons drawn from the box and sworn on voir dire were excused on peremptory challenge by counsel for defendant, and the following are the names of the persons, drawn from the box,

sworn on voir dire, passed upon, accepted by counsel for the respective parties and sworn by the deputy clerk to well and truly try said cause and a true verdict render therein according to the law and evidence, to-wit: James H. Pew, John Thyne, C. D. Warner, Peter Snyder, Irving McCann, Robert Krone, J. Watson Davis, M. P. Jones, Will Cooper, August Fox, Murray Williams and H. A. Warren.

The court and jury were addressed by John P. Gray, Esq., on behalf of plaintiff, and by James A. Wayne, Esq., on behalf of defendant.

John Holmi, Edward Johnson and John Holmi, recalled, were sworn, examined and cross-examined as witnesses on behalf of plaintiff and plaintiff rests. R. E. Garry, Stephen Shaw, John Lamberton, John Pellisier and George Ashland, were sworn, examined and cross-examined as witnesses on behalf of defendant and defendant rests. Edward Johnson and John Holmi were called in rebuttal for plaintiff and plaintiff rests and the evidence closed and after argument by the respective counsel and the instructions of the court said jury retired to consider of their verdict in charge of an officer of the court who was first duly sworn.

Now came the jury all called and found to be present, being asked if they had agreed upon a verdict, they, through their foreman, stated that they had and presented the following verdict, to-wit:

"In the District Court of the United States for the District of Idaho, Northern Division."

EDWARD JOHNSON,

Plaintiff,

vs.

GOLD HUNTER MINING & SMELTING

COMPANY,

Defendant.

VERDICT.

We the jury in the above entitled cause find for the plaintiff and assess the damages at the sum of \$10,000.

C. D. WARNER,

Foreman."

Which verdict was read and the said jury polled and each juror answered separately for himself that such was his verdict, thereupon the court discharged said jury from the further consideration of said cause.

The defendant in said cause was granted 30 days in which to prepare and serve its bill of exceptions.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON,

Plaintiff,

vs.

GOLD HUNTER MINING & SMELTING

COMPANY,

Defendant.

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that heretofore and on, to-wit, the 1st day of June, A. D. 1915, being one of the days of the May 1915 term of the District Court

of the United States for the District of Idaho, Northern Division, before the Honorable Frank S. Dietrich, presiding as Judge of said court and a jury, this cause came on for trial on the pleadings heretofore filed herein, Messrs. John P. Gray and Walter H. Hanson appearing for the plaintiff and Messrs. James A. Wayne and J. F. Ailshie appearing for the defendant.

And thereupon the plaintiff to maintain the issues on his part introduced the following evidence, to-wit:

John Holmi, a witness duly called and sworn on behalf of plaintiff, testified as follows:

Q. What is your name?

A. John Holmi.

Q. Where do you live?

THE COURT: If you don't understand a question, ask the attorney to repeat it to you, or explain it to you. Be sure that you understand before you answer.

MR. GRAY:

Q. Where do you live?

A. I live at Mullan, Idaho.

Q. Where are you working now?

A. I don't work now.

Q. When did you last work?

A. I work in the Hunter mine.

Q. In the Hunter mine?

A. Yes.

Q. How long since you were working there?

A. I started me work the first of September last year.

Q. How recently have you worked there? When did you last work there, Mr. Holmi?

A. When I left here again—the 26th of last March.

Q. You worked until the time you came down here as a witness, is that what you mean?

A. Yes sir.

Q. Had you been working there right along from last September until you came down here?

A. No; I hurt my eye once, and I had to lay off.

Q. When did you go back to work?

A. I go back to work the 20th of April.

Q. This year?

A. This year.

Q. And worked up until the 26th of May?

A. Yes.

Q. Where were you working last 17th of October?

A. In the Hunter mine.

Q. On what shift, the day shift or the night shift?

A. Well, that might be the same time I worked with Johnson.

Q. Yes?

A. But I don't remember the month. I guess it was October.

Q. What shift was it?

A. I worked night shift.

Q. Do you remember the night Mr. Johnson was hurt?

A. Yes.

Q. Where were you working that night?

A. I was working at the same place as Mr. Johnson.

Q. Whereabouts was that?

A. 400 level in Hunter mine.

Q. What floor?

A. Fourth floor. That was the highest floor.

Q. The highest floor?

A. Yes.

Q. What were you doing, what work were you doing?

A. I was mucking.

Q. What was Mr. Johnson doing?

A. He drilled the holes; he was machine man.

Q. Machine man?

A. Yes.

Q. What time did you go to work that afternoon?

A. Well, we started from outside at half past four, and I don't know what time it was we come to work. It was before five o'clock, I believe.

Q. Now, Mr. Holmi, you are a carpenter, are you, too?

A. Well, I have been sometimes.

Q. Did you make that drawing? (Showing paper to witness.)

A. Yes, I made that.

MR. GRAY: Will you mark it for identification?

Said paper was thereupon marked: Plaintiff's Exhibit No. 1, for identification.

(By MR. GRAY:)

Q. Can you tell the jury what this drawing, which is marked Plaintiff's Exhibit No. 1, what it is supposed to represent?

A. What do you want me to tell?

Q. I want you to tell the jury what this is, what this is a drawing of.

A. This is the 400 level in the Hunter mine, one stope in that.

Q. What stope?

A. That stope may be west.—

Q. That is the stope you and Mr. Johnson were working in?

A. That is the stope.

Q. Is that drawn as well as you can draw it? Does that fairly represent the condition there?

A. That is about like it, but I never take any measure with my rule.

Q. But does it fairly show the general condition of the stope that night?

A. Yes.

MR. GRAY: I would like to offer this in evidence.

MR. WAYNE: Let me see it, Mr. Gray, please.

MR. GRAY: I will have it explained more fully, but it can't be done until it is —

MR. WAYNE: Might I ask the witness one question in regard to this?

THE COURT: Yes.

(By MR. WAYNE).

Q. Mr. Holmi, have you shown on this drawing a timber slide that was in there?

A. Yes, I show that there in the other plan once, in your plan.

Q. You haven't shown it on this plan?

A. No, I don't show it—I didn't remember again—you see, I need some help—but I didn't put it here, because I didn't say—I know it was here, but—

MR. WAYNE: Without admitting the correctness of the plan, we have no objection to its being used for illustrative purposes.

(By MR. GRAY).

Q. Now, what does the bottom represent?

A. That is the 400 level.

MR. GRAY: Have you any objections, Mr. Wayne, to my just adding that, as he describes it?

MR. WAYNE: That is all right.

(By MR. GRAY).

Q. That is the 400 level, is it?

A. Yes sir.

Q. Where is the first floor? What would you call the first floor.

A. That floor here.

Q. And the second floor?

A. The second floor here.

Q. The third floor?

A. Here.

Q. The fourth floor?

A. Here.

Q. Had the fourth floor been timbered?

A. It was not timbered over at that—this all was timbered to here.

Q. To the bottom of the fourth floor?

A. No.

Q. Where were you and Johnson working?

A. We was working on the fourth floor.

Q. Just point out as nearly as you can, if you have pointed out the places where you were working.

A. Here was Johnson running the machine?

Q. The man on the little platform with the machine?

A. Yes.

Q. Where were you working?

A. I was working in more this way, mucking.

Q. The man with the pick?

A. Yes.

Q. What is this that you were standing on?

A. On the muck pile there.

Q. The muck pile is broken through, is that right?

A. Yes.

Q. What is this large opening here, extending through the second and third floors down—the first and second floors, from the third floor, and down on to the level, the one that I marked double X, what is that?

A. That is the ore chute.

Q. Now, what is this extending diagonally upon from the old chute to the fourth floor, marked double Y?

A. They call it the slide chute.

Q. What kind of a slide chute was that?

A. The muck slide along that to the ore chute.

Q. Where were you mucking, into what were you mucking?

A. I mucked the ore down there.

Q. Down what?

A. Down the chute, slide chute. There was a hole in the floor, and it goes in the slide chute.

Q. A hole in the floor, on what floor?

A. The fourth floor.

Q. Then, as I understand, you mucked into the slide chute?

A. Yes sir.

Q. Then the ore ran down here?

A. In the ore chute.

Q. Now, Mr. Holmi, just tell the jury the condition of this—how wide was the slide chute?

A. The slide chute was—I don't remember how wide, but not very wide. It was between the posts, all filled up—

Q. All filled up between the posts?

A. I think four feet or less.

Q. What do you mean by the posts?

A. I marked the posts here, this small line here. The posts was eight feet long.

Q. How do they put the posts in?

A. The timbermen put the posts in.

Q. Which way do they run, up and down or across?

A. From down to plumb up.

Q. You say this slide chute extended from the posts on one side to the posts on the other?

A. Yes.

Q. Was the top of the ore chute open?

A. It was open, sure, had to be open.

Q. How far across the drift?

A. It was pretty wide. I don't remember how wide it was. I think it was three feet, I never measured it.

Q. How close did it come to the timbers on the sides, the opening there?

A. The posts?

Q. Yes, the posts?

A. Just close to the wall, just up against the wall.

Q. The ore chute was against the wall, is that it?

A. The posts, you mean?

Q. No, how far—

MR. GRAY: Your Honor, I don't want to indicate what I want—

THE COURT: Well, you can call his attention to—

MR. GRAY: Did the opening of the ore chute there extend clear across the stope, the floor, or only part way?

A. I think it was put in the whole way.

Q. Around the edge of the top of this opening was there anything on the floor, on the side there?

THE COURT. You mean any guard?

MR. GRAY: No, any muck, or rocks, any rocks, or anything around.

A. Both sides like this way, you mean?

(By MR. GRAY.)

Q. Yes?

A. Yes, there was the muck. That always come muck down pretty quick.

Q. What do these represent, Mr. Holmi?

A. Them is the ladders going to work.

Q. And these over here also are ladders?

A. Yes sir.

.Q Now, how far up did the man-ways over here

on the right hand side, on the east, how far up did that extend?

A. How far up?

Q. Yes?

A. The third floor.

Q. Did that man-way extend at all up to the fourth floor?

A. No, it wouldn't be that.

MR. AILSHIE: You referred to that as the east, there.

MR. GRAY: I don't know whether it is east or west.

MR. AILSHIE: I wish you would have him locate it.

MR. GRAY: That is very clear. You can locate that on cross examination.

WITNESS: That is west.

(By MR. GRAY.)

Q. That is west over there?

A. Yes.

Q. This is east over this way?

A. Yes.

MR. GRAY: Well, we will mark W. and E. I don't know that it is very material which way it is.

MR. AILSHIE: Well, I would like to have it accurate.

(By MR. GRAY.)

Q. What does this represent in here between the second and third floor?

A. That is the ladder which was broken.

Q. Now, Mr. Holmi, do you recollect when that

ladder was broken, how long before Mr. Johnson was hurt?

- A. It was broken the first night I go on.
Q. How many nights before was that?
A. I worked all together four nights in that stope.

Q. Then it would be the third night before the injury?

MR. WAYNE: I object to that, because it is too suggestive.

THE COURT: Sustained.

A. I came up this ladder the first night it was broken.

MR. GRAY:

- Q. How much of it was broken the first night?
A. It was about like this, you see.
Q. How about the next night?
A. It was more broken.
Q. More broken?
A. Yes.
Q. Now how badly broken was it the next night, the second night you went up there?

A. I believe I came up two nights over that ladder. It was badly broken another night.

- Q. What night was it that Johnson was hurt?
A. It was the last night, the fourth night I was working.
Q. The fourth night you were working?
A. Yes.
Q. And could you get up that ladder that night?
A. No, it was all broken.

Q. Do you know what broke it?

A. That ladder?

Q. Yes?

THE COURT: How was it broken?

A. It was broken all together in pieces, and I saw small piece under the muck pile; there was a muck pile up the first night, that wouldn't reach the cap.

Q. But a muck pile around it, it was in the muck pile, was it?

A. Yes, and rock.

Q. Now, how did you go to work that night?

A. Up this way.

Q. By this way—you point it out and I will read it.

A. To the first floor—

Q. By the ladder-way?

A. And this way.

Q. To the second floor by the ladder-way?

A. And this.

Q. Then you went over to the face, did you?

A. Yes.

Q. Then where did you go?

A. Came up here.

Q. In other words, you went up to the face, and then by the lagging from the face up on to the third floor?

A. Yes.

Q. Then how did you go?

A. We go up to the ladder and came by the ladder.

Q. Up to the ladder between the third and fourth floor, and then on up that ladder to the fourth floor?

A. Yes, that is the way.

Q. Mr. Holmi, in going from your place of work up here on the fourth floor down to the level on that night, was there any other way that you could go?

A. No. That was the best way, anyhow.

Q. How about this other man-way, could you go that way?

A. That was so dangerous he might kill himself going over the chute there.

Q. You have told the jury that the chute extended from post to post?

A. Yes sir.

MR. AILSHIE: I object to that, as it hasn't been shown that—

MR. GRAY: He testified that it did.

THE COURT: Let us not repeat it then.

(By MR. GRAY.)

Q. How close were the posts to the side of the drift?

A. I meant the other side was—I meant—

Q. This part of it that is marked A in a circle, does that represent a section across the floor there at the chute?

A. Yes sir.

Q. And what are these uprights—

A. Them is posts.

Q. Those are the posts?

A. Yes.

Q. What does this irregular line on the side of them represent?

A. That means the wall.

Q. What does this line between the posts represent?

A. That means the slide chute there.

Q. Now, Mr. Holmi, how was the condition between the posts and the wall, what was that condition as to its being clear, or was there rock or muck or anything else there?

A. The last night it was full of muck.

Q. Between the posts and the wall?

A. Yes.

Q. Now, what did Johnson do after he went on shift?

A. He started to drill the holes.

Q. What happened then?

A. He say his machine was leaking, and he say he had to get a better machine.

MR. AILSHIE: We object to what Mr. Johnson said, and move to strike out what he said.

THE COURT: Oh, that will do no harm.

(By MR. GRAY.)

Q. What did he do then?

A. He needed to change to a better machine, he say.

Q. What did he do?

A. He take his machine and gone down, he say, gone down and change his machine.

Q. Which way did he go. Where did he go—down the same way you said you had come up?

A. Yes, sure.

Q. Now, did you hear him fall, or what did you do next—

MR. WAYNE: I object to that as suggestive and leading.

MR. GRAY:

Q. What did you next know about it?

A. I knew when Johnson hello me.

Q. Hello you?

A. Yes, he told my name, and I heard something like that.

Q. Then what did you do?

A. I go down and see where he is, what place he is now.

Q. Where did you find him?

A. I find him on the first floor.

Q. Just indicate to the jury where, Mr. Holmi?

A. Down here.

Q. Where that man is lying now?

A. Yes.

Q. What position was he in?

A. Well, I can't put my words right.

Q. I mean was he standing up or lying down?

A. Lying down, something like that.

Q. Did you see the machine?

A. Yes.

Q. Where was it?

A. The machine was one side of him.

Q. What did you do then?

A. Well, we get to the station, and Johnson go up. He say he can't work no more.

Q. You took him out?

A. That night.

MR. AILSHIE: We object to him saying that he

took him up. He didn't say he took him up.

MR. GRAY: What difference does it make?

MR. AILSHIE: I object to the question.

MR. GRAY:

Q. Explain to Judge Ailshie, just so he will know, know just what you did, and how Johnson got out, and all about it. He wants to be very particular about it.

MR. AILSHIE: I object to that kind of question, if Your Honor please, and take exception to it. I haven't asked that any explanation be made to me, but that it be made to the jury.

THE COURT: Yes, that is true. We have some difficulty on account of the inability of the witness to express himself clearly, but within general bounds at least we must keep within the rules. You may explain what you did after you found Mr. Johnson there, lying down, you say?

A. Yes.

THE COURT: What did you do with him or what did he do?

A. I first think I go to help him up both sides, lift up, put my hands in his sides, and I lift a little, and he say, "Don't lift me up because that hurt me; I try it myself," to get up here, and he get him up. At the time he get up, but I didn't help him no more than walk before him to the 400 level, by the man-way, by the ladders, and then we walked to the cage, and he gone to the cage, and I gone back to work.

(MR. GRAY).

Q. When you went back there, when you went

down to where Johnson was, just tell the jury what the condition of this plank was, what kind of a plank was this here, this plank from the third floor to the—

A. It was six feet long and three inches thick; I believe it was eight inches wide.

Q. Just tell the jury whether it was nailed or not.

A. I can't tell that, because I don't know, but that looks to me—it stay the same way it was as we go up in the night.

Q. Now, just tell the jury what there was there in the way of a railing or rope, or any guard along the side of it.

MR. WAYNE: All these questions are suggestive, Your Honor. He can have him describe the condition there at the place.

THE COURT: I think he may answer this. Was the plank guarded in any way?

A. No, it wasn't. All the ways I came down—I gets down other hand in here, and then walk along this, with my weight along this, and came down to there, to the second floor.

(By MR. GRAY:)

Q. You had worked there three nights with Johnson, I believe you said?

A. I worked four nights.

Q. This was the fourth night, the one he was injured?

A. Yes sir.

Q. Just tell the jury what kind of a worker he was?

MR. WAYNE: I object to that as immaterial.

MR. GRAY: You admit that he was a good miner?

MR. WAYNE: We make the admissions in the answer.

MR. GRAY: Well, I think I will let him answer that.

MR. WAYNE: Well, I have an objection to it.

THE COURT: Sustained, I doubt whether the witness is competent to answer. He only worked with him three days, I understand.

(By MR. GRAY).

Q. Did you know Mr. Johnson before you worked there with him?

A. Yes, I know him awhile ago.

Q. Can you tell the jury what his general appearance was as to health or being a robust man?

MR. WAYNE: The same objection to that.

THE COURT: How long had you known him?

(By MR. GRAY).

Q. How long had you known him, Mr. Holmi?

A. I know him when he started to work in the Hunter mine, in all, the first of September; I guess it was the first day he was working in the 800.

MR. GRAY: I think that is sufficient, Your Honor.

THE COURT: You may ask him now.

(By MR. GRAY).

Q. What was his general appearance as to being a healthy man or otherwise.

MR. WAYNE: I object to that as incompetent,

irrelevant, and immaterial, because the witness is not qualified.

THE COURT: Overruled.

MR. WAYNE: We have an exception to all adverse rulings?

THE COURT: Yes, all adverse rulings are deemed to be excepted to. State how he looked, whether he looked like a well man or not.

A. Oh, yes, he looked like—I don't know if I can say the words—he looked good.

(By MR. GRAY).

Q. Now, Mr. Holmi, just tell the jury what the condition was below this plank and around it, as to whether or not there was any timbering around it, beneath it, on the side of the plank? You say it was an eight inch plank?

A. Yes.

Q. Was there any timbering on the sides of it, or any flooring on the sides of it?

A. You mean this way?

Q. Yes.

A. Yes sir.

Q. And the first night that you went up, how did you go up to the fourth floor?

A. The first night, I go up the same way to the first floor, and to the second floor, but from the second floor we came up this ladder.

Q. The ladder which you say was partially broken, you came up that the first night?

A. Yes.

Q. Now, you refer to what was known as the east man-way. This is the east man-way is it not?

A. I guess so, yes, that is the east man-way.

Q. And that was the way you went up the first night?

A. Yes sir.

Q. Now, this east manway is pretty close to the ore chute, it is not?

A. Not far, because this ore chute is right in, pretty near behind that.

Q. You have gone—

MR. GRAY: He says this ore chute. Won't you just mark that, mark it B?

MR. WAYNE: You have got the other marked "X." I will mark it X-2.

MR. GRAY: Don't mark it the same.

(By MR. WAYNE).

Q. This one marked B is another ore chute, is it?

A. Yes sir.

Q. The man-way that you went up that night, is located right near the ore chute B, isn't it?

A. Yes.

Q. And this man-way was used by the muckers to dislodge any ore or rock which might catch or stick in the ore chute, wasn't it?

A. I don't—

Q. I will withdraw that question, then. Sometimes the rock or ore would catch and stick in the ore chute, would it not?

A. Sometimes—

Q. And not go down. What I mean is that the ore and rock catches in the ore chute so that you have to go up the ladder and push it down?

A. Oh, yes, sometimes, but not a chute like this.

Q. Not a chute like that?

A. No, because that was on the third floor. It made the long chute.

Q. The long chute, it might catch in that?

A. Yes.

Q. What I am getting at, Mr. Holme, is this, wasn't this east man-way used by the muckers, including yourself, to get to the chutes to clean them when there might any rock get through in them?

A. I don't know. I never cleaned the chutes.

Q. You didn't?

A. No.

Q. Now, on the second night that you went to work on the fourth floor, did you go up this same way?

A. I think I came two nights.

Q. And the second night you went up the broken ladder, which you say was from the second to the third floor?

A. I believe so.

Q. Now, the third night, how did you go up to the fourth floor?

A. I don't know if I the third night came up this way, or might I gone up here.

Q. On the third night you don't know whether you went over this lagging or whether you went up the broken ladder?

A. Yes, sir.

Q. On the first and second nights when you went to work, did you know that there was a plank or lagging over the east end of the stope?

A. No.

Q. Who was it that first told you that there was such a lagging?

A. I don't remember. It was that night, somebody—we came on the second floor, and then I saw this ladder, which was broken. I couldn't get no way up that, and my partner told me he know a better place going up on this end.

Q. And showed you the place?

A. Yes, he said "I notice they have put a lagging over here, and we get here over."

Q. Who was the partner that told you that?

A. I don't know, but it might was Johnson; it might was the car-man.

Q. The car-man, that is, Pellichier?

A. Joe Pillichier.

Q. It was either Johnson or Pellichier then who told you of this plank or lagging?

A. Yes, sir, I believe so.

Q. And then you think that on the third night for the first time you went up by means of this lagging?

A. It might was the third night.

Q. Either on the third or fourth night?

A. I don't remember.

Q. Well, it was either the third or the fourth night that you went up that way?

A. It was either, yes.

Q. Now, Mr. Holmi, you knew at that time that there was a west man-way completed from the sill floor to the third floor, did you not?

A. Yes, I knew that.

Q. And the ladders were in good condition in the west man-way, were they not?

A. I never go in them man-ways except on the first night I was working there. I never saw them man-ways after the first night.

Q. That you hadn't seen them on the first night—

MR. GRAY: I understood he hadn't seen them at all.

THE COURT: I so understood him. Did you ever see those man-ways?

A. Oh, yes, I saw them the first night.

(By MR. WAYNE:)

Q. On the night Johnson was hurt, Mr. Holmi, you say you went up in the east man-way and over this plank?

A. Yes, sir.

Q. Now, you could have gone up the west man-way to the third floor, could you not?

A. Oh, yes. Why not?

Q. And you could then walk on the third floor past the slide chute to the ladder near the easterly ends of the stope, and up that ladder to the fourth floor, could you not?

A. No, we have to come here between the posts over the slide and that was the hole open.

Q. Now, Mr. Holmi, will you just show the jury with your hands how much space there was between the walls or the side of this stope on the third floor and this timber slide?

A. Between the posts and the walls?

Q. Yes.

MR. GRAY: Mr. Wayne, you didn't ask him that at first.

A. The other side was the wall.

Q. On one side there was nothing, is that what you mean to say?

A. Yes. And the other side—like nine feet—here was nothing, and may be this place was like that, and was a little more, down to the bottom.

Q. Now, let us see. What would you say it was, two feet?

A. Eight inches.

Q. At the bottom?

A. Yes.

Q. And what you mean to say is, as you have shown it on this little drawing, that at the bottom between the side of the stope—

A. Yes.

Q. And the posts there was about an eighteen-inch space?

A. Yes.

Q. And then the side or wall of the stope went upward on a slant?

A. Yes, and I don't know the slant. That was—here was close, on top.

Q. In other words, at the top it was close?

A. Yes.

Q. There was very little distance, if any, or very little space between the side of the stope and the post?

A. That was used together, that was the post

against the wall in there on the top, eight-feet posts.

Q. Those are nine-foot floors, are they not—nine feet from floor to floor?

A. Yes.

Q. Now, a man of ordinary height, say five feet and ten inches high, could pass between the side of the stope or the wall of the stope and posts, could he not?

A. The first night I go through that hole, I remember that. I have to a little bit come down like that, and go sideways.

Q. You had to stoop and go sideways, but you could get by, did you?

A. Yes, sir.

Q. Do you remember who took Johnson's place there on the machine after he was hurt?

A. Yes, sir, a man.

A. Who was it?

A. It was George Ashland.

Q. And do you know how he came up to the fourth floor?

A. I don't remember how George came up.

Q. Do you remember George Ashland going down for his steel?

A. Going down?

Q. Yes, down to the sill floor for his steel?

A. No, but he never asked me a question, about George before here, and I don't remember what way he came up.

Q. Don't you know that George Ashland came up or went down for his steel, and went down this

ladder in the east man-way from the fourth floor to the third floor, and then went past the slide chute and timber slide to the man-way at the west end and down that way?

A. No, that wasn't possible.

Q. You don't think it was possible?

A. No.

Q. Now, Mr. Holmi, did you continue to work there as mucker after Johnson was injured?

A. If I am—

Q. I will withdraw that question. Did you work on the fourth floor for several shifts after Johnson was injured?

A. No. it was the last shift I worked with Johnson.

Q. Well, did you work with anybody afterwards on the fourth floor?

A. With anybody? No.

Q. Was that the last shift that you worked there?

A. That was the last shift I worked in there, in this stope, that Johnson got hurt.

Q. You worked that full shift, did you not?

A. The full shift, yes.

Q. And when you quit work on that shift that night or the next morning, how did you go down to the level?

A. By the same way we come up.

Q. By the plank?

A. Yes.

Q. Anyone go down with you?

A. Yes, George came after me.

Q. Did he go the same way?

A. Yes.

MR. GRAY: Who?

A. George Ashland.

(By Mr. Wayne)

Q. Now, that was a six-foot lagging, was it not?

A. Yes, sir.

Q. Three inches thick, you say, and eight inches wide?

A. I believe it was eight inches.

Q. The upper end of the lagging was set on what?

A. On a cap.

Q. And the lower end on a ledge of rock?

A. It was rock against the end of the stope, against the rock.

Q. And what difference in height was there between the upper end and the lower end of that lagging?

A. Maybe two and a half and three feet.

Q. Between two and a half and three feet?

A. Maybe.

Q. Were there any lights at that place?

A. No; no light in there. Everybody got his candles.

Q. They don't have the electric light in the stopes, do they?

A. No.

Q. How many times had you gone over that plank with Johnson before he was injured?

A. How many times?

Q. Once or twice, or—

A. That was in the last night that Johnson got hurted, and that night I gone over it only once with Johnson.

Q. Mr. Holmi, how long have you known Mr. Johnson?

A. I learned to know him in the Hunter mine last September.

Q. You and he are of the same nationality, aren't you?

A. I never asked Johnson, but I don't believe I heard him talk—I heard him say his old country money was called crowns, and mine is marks.

Q. You are both from Finland, aren't you?

A. No, I don't believe so.

Q. You were very good friends, were you not, you and Johnson, you and Johnson are very good friends, are you not?

A. Oh, yes, I have seen him.

Q. You mentioned the fact that you were laid off for some time on account of an injury to your eye?

A. Yes.

Q. You received that injury in the Hunter, did you not, in the Hunter mine?

A. Yes, I had me eye hurt in the Hunter mine.

Q. And you still have an unsettled claim for damages against the Hunter mine on the account, have you not?

A. I want the help. I want another man to help me to talk.

Q. Well, Mr. Holmi, I will put the question in another way. You are making a claim for damages

on account of that injured eye against the Gold Hunter Mine, aren't you?

THE COURT: You want the Gold Hunter Mine to pay you because your eye was injured, you say your eye was hurt?

A. Yes, my eye was hurt.

THE COURT: Now, you want the mining company to pay you for hurting your eye? You understand that, don't you?

A. If you ask, if you like—I never asked that, anyway.

THE COURT: You never asked them to pay you?

A. No, I never thought that they—

(BY MR. WAYNE:)

Q. How long were you off that time that you injured your eye?

A. I laid off on the 7th day of February and started to work the 20th of April.

Q. Haven't you been threatening to sue the Gold Hunter on account of the injury to your eye, Mr. Holmi?

A. No sabe.

Q. You don't understand, or is it no sir?

A. I don't understand.

MR. WAYNE: That is all.

THE COURT: That is all, Mr. Holmi.

EDWARD JOHNSON, A WITNESS DULY CALLED AND SWORN IN HIS OWN BEHALF, TESTIFIED AS FOLLOWS:

Direct Examination.

(BY MR. GRAY:)

Q. State your full name.

A. Edward Johnson.

Q. What is your nationality, Mr. Johnson?

A. Swede.

Q. Born in Sweden?

A. Yes, but I got citizen's papers here in this country.

Q. You are a naturalized citizen?

A. Yes, sir.

Q. How old are you, Mr. Johnson?

A. Thirty-three.

Q. Where do you live?

A. Up at Mullan.

Q. And what is your business?

A. Miner.

Q. How long have you followed mining?

A. Ten years, or a little over, I guess.

Q. Where?

A. I have been here over eight years, and then in Michigan, in the copper mines.

Q. Michigan first, and then in the Coeur d'Alenes?

A. Yes, three years over there at Michigan.

Q. Where were you working last October?

A. At the Hunter mine.

Q. And where is that?

A. That is up at Mullan.

Q. What kind of work were you doing?

A. I was doing miner's work, drilling with a machine, making a hole with the machine.

Q. How long had you worked there at the time of your injury?

A. Well, I was working on that place, I believe, about three or four weeks on that place.

Q. But I mean how long had you worked at the Gold Hunter Mine?

A. All together, you mean?

Q. Yes.

A. All together, I guess I been working about four years, I think.

Q. What kind of work did you do besides running the machine?

A. I was working on the shaft a while.

Q. What wages do shaft miners get?

A. Four dollars.

Q. How long have you worked as a shaft miner?

A. I got four dollars.

Q. What were you earning at the time of your injury?

A. Three dollars and a half at that time. I came up from the shaft.

Q. Who was working with you the night of your injury, that is, up in the same stope?

A. John Holmi.

Q. He is the man who was just on the witness stand?

A. Yes, sir.

Q. Whereabouts in the Hunter mine were you working the night you were injured? Just tell what level, and what floor.

A. I was working on the fourth floor, the top of the fourth floor, starting in the floor.

- Q. Starting another fork of the floor?
- A. Yes.
- Q. On what level?
- A. 400 level.
- Q. Who was your immediate boss; who was your superior?
- A. Steve Shaw.
- Q. What position did he have there?
- A. He look after the men, miners.
- Q. What do they call him?
- A. Shift boss.
- Q. What time in the day did you go to work?
- A. We started in from the outside at half past four, and then we started work at five.
- Q. You are a married man?
- A. Yes.
- Q. Any children?
- A. Yes.
- Q. How many?
- A. Two.
- Q. How old are they?
- A. One is three, and the other one is five, maybe six.
- Q. What did you first do when you went in?
- A. When I went in I went up in my place where I used to work, and barred all that loose ground down, and put the machine in, and started to drill, put a little platform in, and started to drill.
- Q. Then tell what happened.
- A. Well, my machine was out of order; she was leaking.

Q. Leaking what?

A. Leaking in this joint here, you know, and that was worn out, and she was leaking air out. She didn't work, and I didn't have no doings to fix that over there, and I asked the nipper if there was any machines up on the top station, and he said he don't know, "You go up and look, you take your machine along and go up there and look at it."

Q. What had been the practice when your machine got to leaking or out of order?

A. We got to take it to the station and get another one.

Q. How long had that been the practice there?

A. All the time I had been there.

Q. Had you had any orders to that effect?

A. Yes.

Q. Who from?

A. From the shift boss and foreman. He come around, and every time the machine broke he told me, "You better take that down and get another one."

Q. Now you have seen this picture or plat that Mr. Holmi drew?

A. Yes.

Q. Does that correctly represent the general conditions around there?

A. I don't understand, quite.

Q. Does that fairly represent the stope where you were working?

A. Oh, yes, that is pretty close to it.

Q. Now, in what way did you go to work that night, how did you go up?

- A. I went up this ladder here.
- Q. That is on the east?
- A. That is on the east end of the stope, this ladder.
- Q. You went up this ladder?
- A. Yes.
- Q. From where to where?
- A. From the drift up to the first floor and out, and then up to the second floor, and this ladder here was broke.
- Q. That is, the ladder from the second to the third?
- A. Yes.
- Q. Yes?
- A. And the plank was up in here, and the rocks came down out of the hole, and came down the man-way and broke it.
- Q. You are pointing above it.
- A. Yes. And broke this man-way.
- Q. Then how did you go from there?
- A. From there I went up from here over here.
- Q. That is over to the face?
- A. Yes, over to the face, and walked over here, and walked upon this plank, and went this way.
- Q. That is, up the plank or lagging on to the third floor?
- A. Yes.
- Q. Then how did you go?
- A. Up this ladder to the top floor.
- Q. To the fourth floor?
- A. Yes.

Q. How long had this ladder in the man-way between the second and third floors been broken?

A. It was partly broken the third night. There was a piece laid here.

Q. You mean where?

A. The top part was broken from here.

Q. You say the third night. What do you mean by the third night?

A. The third night before I got hurt.

Q. Now, go ahead.

A. The muck had come down and was around here, here was muck, all filled up around here.

Q. Around the ladder?

A. That hold the ladder up anyway, because the end was broke here, but the muck pile was around, and the hold the ladder up anyhow, and I could get up there that night, and then the second night before I got hurt, you know, the night before I got hurt, then when I came on shift the hole was blocked up, and there was pieces left, and then I have to go that way, and go this way up to the fourth floor.

Q. By that way, you mean to the face and up this plank?

A. Yes.

MR. AILSHIE: We object to counsel explaining and interpreting what the witness says.

THE COURT: Overruled.

(BY MR. GRAY:)

Q. Now, then, Mr. Johnson, who did you say your shift boss was?

A. Steve Shaw.

Q. Was he up in that stope the night before you were injured?

A. Yes.

MR. WAYNE: I object to that as leading and suggestive.

THE COURT: Overruled.

(BY MR. GRAY:)

Q. Did you have any conversation or talk with him up in the stope the night before you were hurt?

MR. WAYNE: The same suggestion to that, that it is suggestive.

THE COURT: Overruled.

(BY MR. GRAY:)

Q. Just tell the jury what that conversation was, as nearly as you can recollect, what you said and what Steve Shaw said.

A. Steve Shaw came up that way.

Q. What way?

A. That same way I came up. I couldn't get no other ways up, because the slide chute was across the stope on the third floor; the ladder came up from the west end of the stope, but the slide chute was across the stope, and they couldn't get by that slide chute, because behind the slide chute was filled up with muck, the sides was filled up with muck. There was a little hole between the post—the posts was laying straight here (indicating), but there was a little hole down on the bottom of the posts, between the ground and this post, but that was all filled up with muck the night before I got hurt already, I couldn't get by that way no how. I don't see no chance to get by.

THE COURT: What did Shaw say to you?

(BY MR. GRAY:)

Q. Just tell what you and Shaw said?

A. I don't understand, quite.

THE COURT: You said Mr. Shaw came up there and you talked together.

A. Yes.

THE COURT: Tell the jury what you talked about.

A. Shaw came up, and he said, "This is like a whore house; a man can't get up here no way;" he said, "How did you get up here?" And I said, "It is pretty hard to get up here; you have to go like a rabbit on the timbers here, but you better get a ladder here," and he said, "Yes, I get the timber men to put them ladder over there; I get the timber men to put the ladder over there."

(BY MR. GRAY:)

Q. When was that now?

A. The night before I get hurt. He said, "You go that way now, on that plank, so long as the timber men come up here. I get the timber men up here as quick as I can, to put that ladder there."

Q. Who put ladders up, and did that kind of work?

A. The timber men used to do that.

Q. Was that any part of your duty?

A. No, I didn't have nothing to do with it. Only mining was my—

Q. What shift was this?

A. Night shift.

Q. Did any timber man work on the night shift?

A. One part—two men worked that time on the night shift.

Q. Was there anything else said about ladders?

A. No. He said he go and fix that. He said he give the foreman orders already the day before, that he sent the ladder in, you know, that he gave orders to make the ladder and send in the ladder.

Q. Now, who had charge of the timber-men?

A. The shift boss and foreman.

Q. Coming back now to this slide chute, I think you have probably described that. What is this big opening here, running from the third floor down to pretty nearly the 400 level?

A. That is the ore chute, made between the posts and the wall, that is the chute; ore goes down in the chute.

Q. What was the condition of the top of that?

A. The floor on the top there used to be, but now when they made that slide chute they have to open up the floors, and then the rock broke the floor more, and there was the whole floor up, and there was only about that much place on the sides, you know, and that was filled up with muck like this.

Q. You say, "like this." How much?

A. About eight inches.

Q. Eight inches on the side?

A. Yes.

Q. That would be along the wall, would it?

A. Along the wall, yes.

Q. What condition was that in?

A. That was in there just for the—in there—the rest of them had blocked it up, blocked it up with the blasts.

Q. Was there anything on that plank, that six or eight inches?

A. There was muck, like that.

Q. Muck?

A. Yes, it fly all down on the slide chute, the muck go over that chute anyway, only about an eight-inch board on the side, you know, on the side, on the planks, you know.

Q. That is, on each side of the slide chute, a six or eight-inch board?

A. Yes, the slide chute was about three feet and a half wide, I guess, and a board on each side of that.

Q. How close to the posts did the slide chute extend?

A. From post to post.

Q. How about the ore chute, how far across the drift did it extend?

A. The ore chute?

Q. Yes.

A. He was all open, you know, only a narrow little plank on the other side; I remember the other side was all broken to the wall.

Q. Which side was that?

A. That was the hanging wall side.

Q. Is this the hanging wall here?

A. Yes.

MR. GRAY: I will mark this "W."

(BY MR. GRAY:)

Q. That is the hanging wall?

A. Yes. And the vein leans a little; it make a little crack between the floor and the post here, this end of the post across the ground, the top end of the post is across the ground, and the lower end of the post, and it comes a little opening on the bottom, you know.

Q. That would be along the side of the ore chute?

A. Yes, on the front side of the ore chute.

Q. And on the other side of the ore chute, you say there was about eight inches of plank?

A. Yes.

Q. That would be on the footside wall?

A. No, on that side, I mean.

Q. On which side was there about eight inches of—

A. On this side here.

Q. That would be on the hanging wall side?

A. Yes.

Q. And on the foot wall side it was all broken?

A. It was all broken.

Q. Around the top of this ore chute, was that built up any, or was there—

A. No, there was only rock around that, rock pile, you know, laying all around it.

Q. Was the man-way on the west end, did it extend above the third floor?

A. No, it came up to the third floor, not further.

Q. When was it that you first had to go up this

way, you see, along here, and along this place, what night?

Q. The night before I got hurt.

Q. Was that the first time you went up this way?

A. Yes.

Q. And then also the night before you were hurt?

A. Yes.

Q. Tell the jury what happened after you took down this machine.

A. Well, I took my machine down; my machine was out of order, so I took my machine and I took it on my shoulder, and started to pack it that way, and took the hose off the machine, and took the machine, and put it on my shoulder, and then I walk a little ways, so long as I had room to walk, with the machine on my shoulder, and then I took it in my hand, when the ground was too low, and I had to bend down like this, and pack it in my arms.

Q. How did you go from the fourth floor down to the third floor?

A. I went on that ladder down to the third floor, you know.

Q. Then how did you go?

A. I had my machine in my arms, you know, and I came down to the third floor.

Q. Yes?

A. And then I walked through the third floor to that end, you know.

Q. Yes?

A. And stepped on that place there, and walked a little ways on that plank, and then I don't know

how it happened: I don't know if that plank turned a little and my foot slipped—everything happened so quick that I couldn't tell which way it went there.

Q. Then what happened to you, when did you next know anything?

A. Then I was down on the first floor when I wake up there.

Q. When you wake up?

A. Yes. I went wrong, you know, and then I wake up, and I started to stand up, but I couldn't get no wind, so I was laying there for a while, so I get a little wind, so I could holler a little to my partner, and I hollered up to John, and then he heard me, and he come down fast, and he asked me what I want.

MR. WAYNE: I object to the conversation.

(By MR. GRAY:)

Q. What happened then? You need not say what you told him. Just say what was done with you or what you did.

THE COURT: What did you do after he came down. What did you do then?

A. After I—

THE COURT: No, after Mr. Holmi came down, after he came down and found you, what did you do?

A. I was laying down there yet. I don't have enough wind so I could get up, and then my back was sore, and the machine was close to my back when I get up first, but I could—the back was awful sore, and then when Mr. Holmi come down he asked me what is the—

MR. WAYNE: I object.

(By MR. GRAY:)

Q. Not what Holmi said. What did they do with you or what did you do?

A. Holmi want to help me out, and took hold of my arm, and he wanted to lift me up, you know, but I couldn't stand it, because my breast was sore here, and the rib here, and I couldn't stand it, and he took the arm, and so I said, "I try to pull myself up on the hand-way." I had a candle stick, and he hung it up. When he showed the light I found the candle stick, and he gave me the light on the candle stick, and he found my hat. The candle stick was right beside me.

Q. How did you get out of the mine?

A. I could walk a little. I pulled down the man-way, and the left arm, I had power in the arms then yet, you know, and I could go down the man-way, hold with the hand, and go down the man-way, and could walk a little easier,—the staging was up close.

Q. How did you get from the man-way and go to the station?

A. I took hold of the wall, and I was awful sore, you know, every place was like it was rub up.

Q. Then how did you get out of the mine?

A. The cage just happened to come up when I got to the station and the nipper came up from the bottom, and I went up with him then to the station, to the top station, and then the motorman took me outside from the mine, from the station.

Q. How did you get home?

A. They took a rig, and took me down to the doctor's office with a rig.

Q. What doctor?

A. Dr. Ross.

MR. WAYNE: I object to any more of this as immaterial, under the present condition of the pleadings.

MR. GRAY: What do you mean, Mr. Wayne?

THE COURT: I am not very familiar with the pleadings.

MR. WAYNE: Under the amendment made this morning, if Your Honor please, we admit the injury as described in paragraph eleven of the complaint, of the amended complaint. In other words, we contest only the question of how those injuries were received. If Your Honor please, if you will take paragraph eleven of the amended complaint, and the amendment to our answer, which I filed this morning, you will see that there is no issue raised as to the nature or extent of the injuries.

MR. AILSHIE: There is no issue as to the injury whatever; the only issue is as to the question of the defendant's negligence, whether there is any negligence in this case.

MR. GRAY: In other words, you admit that he was injured, permanently injured?

MR. AILSHIE: We admit it just as that paragraph alleges it, so far as the nature of the injury is concerned. The method of receiving it and the manner of receiving it is the only issue.

MR. GRAY: Notwithstanding that, I think the witness has a right to explain even in more detail than alleged the injury which he is suffering.

MR. AILSHIE: I submit, if Your Honor please, that when the issue is not tendered, that no evidence is admissible.

THE COURT: The allegation seems to me to be somewhat full. It seems to me it would be unnecessary to take up time to go into it.

MR. GRAY: You may inquire.

CROSS EXAMINATION.

By MR. WAYNE.)

Q. Mr. Johnson, how old did you say you were?

A. Thirty-three years.

Q. For how many years have you been a miner?

A. For about ten years or a little over, I guess, I have been working in the mines.

A. For how many years or for what period of time have you worked in the Gold Hunter Mine?

A. How many years?

Q. Yes, or how long?

A. Well, I don't know; I can't tell for sure, but around four years, I guess.

Q. Have you ever worked in any other mines in the Coeur d'Alenes?

A. Oh, yes.

Q. What other mines?

MR. GRAY: Will you permit me to ask him just one question?

MR. WAYNE: Certainly.

(By MR. GRAY.)

Q. Around this plank Mr. Johnson, were there any railings or hand-holes or guards?

A. No.

MR. GRAY: That is all.

By MR. WAYNE.)

Q. What other mines in the Coeur d'Alenes have you worked in besides the Gold Hunter?

A. At the Morning mine, and the Snowstorm.

Q. They are both up in the same locality as the Gold Hunter?

A. Yes.

Q. Near Mullan?

A. Yes.

Q. Now, for how many days or weeks before you were injured had you worked it in this west stope on the 400 foot level?

A. I don't know correctly how many days, but I think around three or four weeks.

Q. Around three or four weeks?

A. Yes, maybe more; I ain't sure now.

Q. You worked there before the fourth floor was being worked, did you not?

A. Yes, I worked on the second floor too, I started—It was finished up so that third floor when I went up, that they took that end out with the machine, and I worked that out.

Q. Now, it was the custom there in opening a stope to open it at the west end first, was it not, in this particular stope?

A. I don't understand what you mean.

Q. They did the first work on any of these floors in this stope at the west end, did they not, first?

A. I don't understand that.

Q. When you went to work they were working on the second floor in this stope, were they not?

A. Yes.

Q. And you worked on the second floor, didn't you?

A. Yes.

Q. And you also worked on the third floor, did you not?

A. Yes, I worked on the third floor too.

Q. Didn't they, in the Hunter mine, in this particular stope, take the rock down at the west end of the stope first, before they took it down in the east end?

A. Which end they started to run, you know, which end they started to work with the machine, you know.

Q. Didn't they start to work with the machine in the west end first?

A. Yes, they start over there now, on the west end that time, and the time before too.

Q. And then after they had the rock and ore stoped out for the height of a floor, they then put in a man-way up to that floor, and put a ladder in it, didn't they?

A. Yes.

Q. And you were familiar with the man-way in the west end of the stope, weren't you?

A. I don't understand.

Q. You know there was a man-way?

A. Oh, you, I knew that.

Q. And at the time of your injuries that man-way was complete to the third floor, and provided with ladders, wasn't it?

A. Yes, to the third floor.

Q. Now, the ladder which you say was broken was not in a man-way was it?

A. It was there in the man-way, but he was broken; the man-hole was there and the ladder was there, but he was broken.

Q. Isn't it a fact, Mr. Johnson, that the ladder which became broken was one which had been taken from the west man-way and brought down to this second floor, and just put from floor to floor, but not in a man-way?

A. I don't know that.

Q. During the three or four weeks that you worked in this stope, or was it two or three weeks?

A. Three or four weeks, four, I guess, anyhow.

Q. All right. During the four weeks that you had worked in that stope, you had gone up this west man-way, didn't you?

A. Yes, I went up that man-way.

Q. Now, which side of the ore chute was the timber slide?

A. Behind the ore chute.

Q. Which is behind? Was it on the west side or the east side?

A. The west side is behind.

Q. And the timber slide extended from the sill floor clear to the fourth floor, didn't it?

A. Yes, clear up to the third floor, you know; the fourth floor was filled up with muck.

MR. GRAY: Where was that timber slide?

MR. WAYNE: He says it was west of the ore chute.

A. It was behind the ore chute, behind the slide chute, you know, here.

(By MR. WAYNE.)

Q. Let me see if I understand you. As a matter of fact, didn't that timber slide come clear to the fourth floor?

A. He come to the third floor, the timber slide.

Q. And didn't go to the fourth floor?

A. No, it can't come up when the muck pile was up on the fourth floor.

Q. You mean to say the timber slide only came as far as the third floor?

A. Yes.

Q. That timber slide was provided with some sort of a hoist apparatus, a hand hoist, wasn't it?

A. Yes.

Q. And the rope had a chain on the end for fastening objects which you wanted to hoist up or down, didn't it?

A. I couldn't use that hoist.

Q. I haven't asked you whether you could use it or not. There was a chain on the rope?

A. Yes, there was something on the rope there.

Q. Did you used to bring your steel up yourself?

A. Yes sir.

Q. How did you bring it up? Did you carry it up?

A. Yes.

Q. Or bring it up in the timber slide?

A. I carried it.

Q. Had you taken this drill up yourself?

A. Oh, yes, every time.

Q. How would you bring the drill out?

A. Yes, I carried it on my shoulder.

MR. GRAY: That is an Ingersoll hammer drill?

A. Yes sir.

(By MR. WAYNE.)

Q. How much do they weigh?

A. I ain't sure, but I think they weigh about 75 pounds, something like that; I ain't sure.

Q. What was the matter with your drills?

A. Oh, he was out of order, he was leaking, and I couldn't make the hole. I was working with him for an hour, and he don't make no hole; he don't have no power.

Q. Isn't it the custom in the mines in which you have worked, including the Gold Hunter, whenever there is anything the matter with your drill, and you want to send it down to the level, to have the carman come and get it and take it down?

A. No, I didn't have no orders on the carman there.

Q. Hadn't you, as a matter of fact, been told by Steve Shaw that any time you wanted steel, or any time there was anything the matter with your drill, to have the carman come and either take it down himself or help you take it down?

A. Well, he won't let—give me the carman to help me up there. It was my orders to take the steel up to the top, you know.

Q. Hadn't Steve Shaw told you that?

A. No.

Q. Isn't this carman simply a spare hand there who is supposed to wait on you in such matters as that?

A. No, the carman don't have nothing to do with me, you know. He don't have—he only runs the car and empty the chute, and muck out the chute.

Q. That particular carman helped to do the mucking, did he, too?

A. He don't help me. I didn't use him.

Q. You have mentioned a nipper that was working there. What are the duties of a nipper?

A. Nipper, he take the steel down, and then he take the orders for the powder, how much powder a miner needs.

Q. Has he no duty in regard to a machine being out of order?

A. I don't know anything about that.

Q. Had you ever had occasion before to take down a machine and take it down to the level for repairs?

A. I don't understand.

Q. Had you ever wanted to take a machine down from where you were working to the level before that night?

A. No, I never took my machine down from that place at all.

MR. GRAY: He doesn't understand.

(By MR. WAYNE.)

Q. If you wanted to tak eyour machines down, as you say you did, you could have called on the nipper to take it down for you, couldn't you?

THE COURT: Why didn't you call the nipper to help you take your machine down?

A. The nipper only comes around once or twice a shift, you know, he went by me already in there, but just the time he come, if you need some help me out, but he wasn't around there any more, and if I started to wait for him I have to wait all night, and stay there and wait all night.

(By MR. WAYNE.)

Q. How long had you been working on this shift before your drill became out of order?

A. Oh, about two hours, I was working there.

Q. Now then, you say the night before you were injured was the first time you ever went over this plank?

A. The night before?

Q. Yes, the night before you were injured.

A. Yes, but I don't remember that I been gone that way before.

Q. You had been going up the ladder from the second to the third floor before?

A. Yes, when I was working on it I was there all the time, when I worked the ground out, and there was lots of muck there.

Q. And even after this ladder was partially broken you had still continued to use it, hadn't you?

A. So long as I had the ladder there I went that way, you know.

Q. Had this plank been in that place before the ladder was broken?

A. I don't know. When the ladder was broken I found out that plank, you know.

Q. How did you find out about that plank?

A. There wasn't no chance to go the other way, you know. I was looking around there, and I went over that way, and I found the place, found the plank over there, and I went that way.

Q. Was the plank in place from the ground to the cap at the time you first saw it?

A. Yes.

Q. Do you know who put it there?

A. I don't know that.

Q. Did anybody tell you it was there?

A. No, I was the first man going up to the stope, you know.

Q. You just went and found it?

A. Yes; I couldn't get up—I started to look for a way to get up there.

Q. That was an ordinary lagging such as was used in that mine, wasn't it?

A. Yes.

Q. Six feet long?

A. Around six feet, I guess; I don't know just—but I think it was about six feet.

Q. Eight inches wide?

A. Around there—I didn't measure it, but it looked like an eight inch plank.

Q. Do you know whether or not the upper end of it was nailed to the cap?

A. No, I don't know that.

Q. You never examined it to see?

A. No, I didn't see it.

Q. And there was a wall of how much from the upper to the lower end?

A. The floor, you mean?

Q. The fall, the lower end was how much lower?

A. Oh, it was like this, you know,—I think it was about two feet and a half, like that, the lower end, you know, and the upper end.

Q. How many times had you gone over the plank before you were injured?

A. I don't know that. I went quite a few times, you know; I had to go up and down there to get the steel and—

Q. There were no lights at that place, were there?

A. How?

Q. There were no lights at that place?

A. No.

Q. You simply used your candle?

A. Yes.

Q. Had you ever gone up the west man-way to the third floor, and then over to the east man-way, and up the ladder to the fourth floor?

A. What do you mean—ever gone up—

Q. Have you ever gone up that way?

A. Oh, yes.

Q. Now, these ladders, Mr. Johnson, that they used there, they are all the same length, aren't they?

A. Yes, about the same length, I guess.

Q. What are they, ten foot ladders?

A. I don't know—about that.

Q. And they keep those ladders down on the level ready to take to any portion of the mine and use don't they?

A. Sometimes they have a ladder on the station and sometimes not.

Q. Now, this broken ladder was in such condition that it couldn't be repaired, as I understand you, was it?

A. I don't know. I don't understand what repair means.

Q. This ladder between the second and third floor was all broken, was so broken that it couldn't be repaired, couldn't be fixed?

A. Yes, it was all broken up.

Q. They had to put in a new ladder?

A. Yes.

Q. How long would you say it would take them to get that new ladder and hoist up there and put it in place?

A. Well, if they had the ladder on the hoist it wouldn't take very long.

Q. Just a few minutes, a matter of a few minutes?

A. Yes.

Q. They had the ladders there ready made, ready to use?

A. No. At that time there wasn't no ladder on the whole place there. I couldn't see no ladder no place.

Q. By the whole place, what do you mean?

A. The whole stope. And not any on the station either.

Q. How long was this stope?

A. I don't know how long it was.

Q. Between sixty and fifty feet, wasn't it?

A. Oh, I guess it was.

Q. And the cage went up right at the east end of the stope, didn't it? The cage in the shaft was within a few feet of the east end of this stope?

A. Yes, I think it was part of the shaft from the east end of the stope.

Q. And they had ladders on other floors, didn't they, ready to use?

A. I don't know that—not on the floors, but they may be had other ladders, I don't know that because I was working on that level.

Q. Between the east and west man-ways how far was it, about how many feet?

A. Well you know the stope he was pretty long, and the other one was—the west man-way was just the end of the stope, the west end.

Q. And the east man-way was—

A. A little further, you know, from the end.

Q. Three or four sets? t

A. Four or five sets, like that, I think.

Q. The two man-ways weren't any further than about thirty feet apart, were they?

A. Yes, about forty feet, I guess.

Q. About forty, you think?

A. Yes, I think. I don't measure it, just look at it.

Q. Did you help make this map here?

A. No.

Q. You didn't?

A. No.

Q. Were you present when it was made?

A. How?

Q. Were you with Mr. Holmi at the time when he made it?

A. I was over there when he made that, but I didn't make that.

Q. Did you tell him how to make it?

A. No.

Q. You didn't?

A. I can't make that kind of a map.

Q. Did you talk to him as to how it should be made?

A. I don't talk anything else, but I told him to make that out how the place was.

Q. You did tell him how the place was?

A. I didn't tell him, but I told him to make that map how he understand the place, you know.

MR. WAYNE: That is all.

MR. GRAY: That is all, I think we will rest, but it is after twelve, and can't we have until after lunch to determine whether or not—

A recess was taken until 2 p. m.

EDWARD JOHNSON, RECALLED.

DIRECT EXAMINATION.

(By MR. GRAY.)

Q. Mr. Johnson will you tell the jury how your health was, before this accident, this injury?

A. My health was good always; I was a strong, healthy man.

MR. GRAY: Mr. Wayne, will you agree that the expectancy tables, the American Tables of Mortality,

show that the average expectation of life of a man thirty-three years of age is 32.2 years?

MR. WAYNE: We admit that the American tables of mortality show that.

(By MR. GRAY.)

Q. Mr. Johnson, just one other question. Just tell the jury whether at any time prior to your injury you told Mr. Holmi about this way up the plank as a way to get up to the place of work?

MR. AILSHIE: I object to that as incompetent, irrelevant and immaterial, and it has reference to his own witness a conversation with his own witness.

MR. GRAY: They brought out by Holmi that either Johnson or the nipper, or some other man, told him about this way to go. And I wanted to know whether—

THE COURT: Objection sustained.

MR. GRAY: That is all.

MR. WAYNE: This is not directed to your present examination, Mr. Gray, but—

CROSS EXAMINATION.

(By MR. WAYNE.)

Q. This slide chute had been built or re-built the night that you was injured, had it not?

A. It was being before.

Q. But there was one which had become out of repair or been broken by rocks and dirt, and this one was rebuilt on the night that you was injured, before your injury, was it not?

A. No, I don't remember. When they made that

they blast a hole up the top floor, and then she get broke, one place.

Q. Didn't Holmi and Pellecier rebuild and repair this slide chute the night you were injured?

A. No.

Q. Do you know whether they did or not?

MR. GRAY: You mean before his injury?

MR. WAYNE: Yes, before the injury.

A. No, they don't build it that night I was hurt; it was a few nights ago that it was builded.

(By MR. WAYNE.)

Q. A few nights before?

A. Yes.

Q. Now, Mr. Johnson, you spoke about this slide chute taking up all or nearly all of the space between the new timbers and the top. Isn't it a fact that it came down in a sort of a funnel shape, so that at the place on the third floor where it went into the straight chute it was only two or two and a half feet wide?

A. I don't understand. I would like to have a man that can talk. I can't understand.

Q. I will ask it differently then. This slide chute was narrower at the bottom than it was at the top, wasn't it?

A. The same kind of a plank, you know, it is no narrower; it is the same one end as the other. It is the same wide at each end.

Q. I don't mean the plank, but I mean the entire width of the chute; it was narrower at the bottom than it was at the top, wasn't it?

A. No.

Q. Wasn't it made narrower and shaped something like a funnel at the bottom, so that the rock and the ore as it came down would hit near the center of the chute, instead of going over the side?

A. The side chute is made on the level, you know, straight down the slide chute, you know.

Q. Then you mean to tell the jury that it was the same width at the bottom and at the top?

A. It was the same wide from the bottom and from the top, but just on the ends I don't know, but it looked the same anyhow.

Q. Had you ever seen the slide chute?

A. Oh yes.

Q. When was the last time you noticed it before you were injured?

A. I see the slide chute when she was built over there.

Q. That was about four nights before, I guess, four or five, I don't remember, four or five nights ago, I think it was four nights.

MR. WAYNE: That is all.

(By MR. GRAY.)

Q. Had you seen it after that and before you were injured, Mr. Johnson, after four nights before did you see it the night you were injured, or the night before that, or the night before that?

A. Yes.

Q. Which night did you see it?

A. I seen it on the third night, he was there, the third night before I got hurt.

Q. Did you see it after that?

A. Yes, after that always.

Q. Just tell the jury—

A. I seen it when I came up from the drift, when I came up I used to look over there all the time if there was any chance to go through there, but there wasn't any chance to go through when the slide chute was over there.

Q. Now, I don't know whether that is clear. When was it when you went up that you say you saw it from the drift, what night?

A. Three nights before I got hurt.

Q. Did you see it after that and before you were hurt?

A. Before I was hurt, you know.

Q. Yes, after three nights before?

A. Yes.

Q. In other words, did you see it the night you were hurt?

A. Yes, the night before, and the third night I seen it there.

MR. GRAY: That is all.

RE-CROSS EXAMINATION.

(By MR. WAYNE.)

Q. How far was this slide chute on the third floor from the ladder in the east man-way?

A. The east man-way, you see the east man-way was on the second floor.

Q. And as you went up you only had your candle, that was the only light you had?

A. Yes, only a candle.

MR. WAYNE: That is all.

MR. GRAY: That is all.

JOHN HOLMI, RECALLED.

(By MR. GRAY.)

Q. Mr. Holmi, something was said this morning about a timber slide, do you remember that?

A. Yes.

Q. Did that timber slide come up to the fourth floor? How high up did it come?

A. The first night, I was behind that slide in the west end.

MR. WAYNE: I don't think that is responsive to the question. He asked how far it came up.

(By MR. GRAY.)

Q. Just tell when you saw it and how far it came up, and all about it?

MR. WAYNE: I object to the form of that question, if Your Honor please.

A. And I don't remember this timber slide that time. May be I saw it, may be not. But this wasn't open here, the third floor.

(BY MR. GRAY:)

Q. Tell the jury if it extended up above the third floor, to the fourth floor, do you understand?

A. I guess not.

Q. Did the timber chute, the timber chute or timber slide, whatever you call it, come up to the fourth floor?

A. No.

Q. The night of the accident, was it up that high?

A. No. I never was up there before — afterwards.

Q. But at the time of the injury, the night you

were working there, did it come up to the fourth floor then?

A. No, not possible.

Q. One other question about this slide chute. How about that, what was its width at the bottom here compared with its width up here at the top?

THE COURT: Was it smaller at the bottom or the same size?

A. The same size.

MR. GRAY: That is all.

CROSS EXAMINATION.

(By MR. WAYNE.)

Q. Mr. Holmi, just a question. The foot wall side of this slide chute was straight, wasn't it?

A. What side is the foot wall side?

Q. Well, don't you know which was the foot wall side and which was the hanging wall side? Mr. Holmi, there was one side of this slide chute that was straight, wasn't there?

A. Yes sir.

Q. And the other side came in a slanting direction to form a sort of a funnel at the bottom, isn't that right?

A. Yes sir.

Q. And at the bottom of that sort of a funnel the slide chute was only about two feet or two feet and a half in width, wasn't it?

A. It was more.

Q. Well, how much more?

A. It was about three and a half.

Q. About three and a half?

A. Yes.

Q. And it was built that way for the purpose of preventing the rock and dirt as it came down from going over the side of the straight chute, isn't that a fact?

A. I don't understand.

MR. WAYNE: That is all.

RE-DIRECT EXAMINATION.

(By MR. WAYNE.)

Q. Mr. Holmi, didn't you help rebuild that slide chute the night that Johnson was injured?

MR. GRAY: Before or after?

A. For whom?

(By MR. WAYNE.)

Q. I don't care for whom.

A. Yes, I helped. I built that slide chute with the carman.

Q. You and Pellecier built it?

A. Yes sir.

Q. You repaired it and fixed it up the night that Johnson was hurt, didn't you, before he was hurt?

A. We did that slide chute the first night I was working in the stope.

Q. Afterwards it became out of repair and you fixed it up new again on the night that Johnson was hurt, didn't you?

A. No. That slide chute we—

Q. What was your answer to that? You say no. It had only been used—

A. Only that slide chute. What we built the first night was used all the time I was in there, and no other one was built.

MR. WAYNE: That is all.

MR. GRAY: That is all. We rest.

R. E. CARRY, a witness, duly called and sworn on behalf of defendant, testified as follows:

DIRECT EXAMINATION.

(By MR. WAYNE.)

Q. State your name?

A. R. E. Carry.

Q. Where do you reside?

A. Mullan, Idaho.

Q. What is your occupation?

A. Surveyor and assayer.

Q. By whom are you employed at the present time?

A. The Gold Hunter.

Q. Have you made a map or maps showing the west stope of the 400 foot level of that mine?

A. I have.

Certain plats were thereupon marked: Defendant's Exhibits 1-A to 1-G, inclusive.

(By MR. WAYNE.)

Q. Mr. Garry, defendant's exhibits 1-a, 1-b, 1-c, 1-d, 1-e, and 1-g, are the various maps you have made?

A. Yes.

Q. Now, what does this exhibit 1-a represent, Mr. Garry?

A. It represents the condition of the stope November 1, 1914, that is the closest record we have.

Q. And exhibit 1-b what is that?

A. That represents the condition of the stope at the time of the accident.

Q. And that is constructed on the same plan as the plaintiff's exhibit, 1—is it not, showing one floor above the other, a sort of a cross-section, isn't it?

A. His runs east and west, and that is the other way, that is all.

Q. And 1-c, 1-d, 1-e, 1-f and 1-g are the floor maps, are they not?

A. Yes sir.

Q. And show simply the shape of each floor as it was mined out?

A. Yes.

Q. That is right, is it?

A. Yes.

Q. Now will you indicate upon this map the directions west and east, so that we may know?

A. This is west.

Q. You had better mark it.

(Witness places letters E. and W. on map.)

Q. Have you indicate upon this map what has been called here the west man-way?

A. I have.

Q. How is that indicated?

Q. These hatched lines?

A. The straight lines with the little dashes on the side of them.

Q. On the west end of the map?

A. On the west end of the map.

Q. That is the west man-way?

A. Yes.

Q. And you have marked the timber slide or ore chute?

A. Yes.

Q. And the other ladders at the east end represent what has been called here the east man-way?

A. Yes.

Q. Now, where did you get the information from which you drew in the red lines which you have called the plank?

A. That was from Shaw and Ashland.

Q. You didn't know as to the correctness of that?

A. No.

MR. WAYNE: I offer these maps simply for illustrative purposes:

MR. GRAY: Not as tending to be an accurate survey or anything of that kind?

MR. WAYNE: Except as we will point it out by the evidence. Yes, Mr. Gray, so far as floors are concerned, it does represent an accurate survey, but as to the position of the ladder at the east end, nor the plank.

MR. GRAY: I certainly object to the first one, Exhibit 1-a. It is perfectly evident that considerable work must have been done there subsequent to the injury and before that map was made.

MR. AILSHIE: I suggest that this was an actual survey made by this man at this time.

MR. GRAY: You have already asked him and

he said it was November 1st, and there are five or six floors there.

MR. AILSHIE: November 1st is very close to the date of this occurrence.

THE COURT: With that explanation, I can't see that the jury would be misled.

MR. WAYNE: The evidence is that it was open only to the fourth floor at that time.

MR. GRAY: I object to Exhibit 1-b for the reason that it pretends to be a survey, but it isn't shown when it was made, or where he got the other information than that derived from the witness Shaw with regard to the plank.

THE COURT: Perhaps you had better ask him from what sources this information was derived, and how these maps were made up.

MR. WAYNE: From what sources did you get the information from which you made the maps 1-b to 1-g, inclusive?

THE COURT: Now, excepting the plank that you have referred to, and the ladders.

MR. WAYNE: The ladders at the east end.

A. The maps is all accurately measured from the condition of the ground at this time, where there has been no work done below this fourth floor, and it is the same as it was at the time of the accident. The only thing that was taken from Shaw was the position of two or three ladders and the plank.

(By MR. WAYNE.)

Q. Which two or three ladders were they?

A. These two ladders on the east man-way.

Q. The two ladders on the east man-way?

A. That wasn't a permanent man-way, so the ladders are not in.

(By MR. WAYNE.)

We renew our offer now.

MR. GRAY: I renew my objection.

MR. WAYNE: Take the witness.

CROSS EXAMINATION.

(By MR. GRAY.)

Q. When did you make the survey from which you made these?

A. On the 26th day of last month.

Q. The 26th of April?

A. 26th of April.

Q. You are in the employ of the defendant company, are you?

A. Yes, sir.

Q. Are any of those ladders in the same position they were on the day of the accident?

A. Some of them. Yes.

Q. Which ones, from your own knowledge, I mean?

A. These two are in the position.

Q. That is the lower two on the west man-way?

A. Yes. And this one.

Q. The upper one?

A. The third floor has been moved.

Q. On the west?

MR. AILSHIE: If Your Honor please, I want to enter an objection to counsel repeating and inter-

preting the evidence of the witness. I insist that the question be asked so that the witness can answer.

THE COURT: That is in a measure true. The difficulty about it is that you have produced here very small maps, and the jury is having some difficulty in understanding what the witness means by his answers, as I am. If you will stand up before the jury as you explain this map, and explain it to them just as you would to some one in your office, and explain it in such a way, Mr. Witness, that the reporter's notes will show what you mean.

MR. GRAY: Now, then, show the jury now and describe the ladders that are in the same position?

THE COURT: It is unfortunate that you didn't have a larger map made, gentlemen.

MR. GRAY: Just explain if you can, what ladders were—

A. The ladder from the sill floor to the first floor is in the same position it was at the time of the accident.

Q. You are referring to the west man-way?

A. The west man-way. The ladder from the first to the second floor is in the same position that it was at the time of the accident. The ladder from the second to the third floor has been moved, but the position of the ladder is shown by the hole in the floor above.

Q. Where is the hole on the map?

A. In the third floor.

Q. Does the hole show on the map?

A. The hole doesn't show on the map.

Q. May I ask how you know those two lower ladders are in the same position?

A. Because I saw them.

Q. Saw them then?

A. Saw them, not at the day, but they have been there before and after the accident.

Q. Are they the same ladders, or have they been replaced?

A. They may have been renewed.

Q. All right.

A. This ladder on the east man-way from the sill to the first floor is not there now. From the first floor to the second floor is not there now, and from the third floor to the fourth floor is not there now.

Q. What is this other one you have got over here, away over in the breast from the second to the third?

A. That was a ladder from the first into the second that was in at the time of the accident.

Q. How do you know?

A. I don't know—

Q. You don't know from your own knowledge?

A. No.

Q. Now, this 1-a, after the accident there was considerable work done in that stope before you again surveyed it?

A. It was thirteen days after the accident, and they had taken out some ground.

Q. Is any other of it—is the ore chute or the inclined chute an actual survey?

A. The ore chute is an actual survey. The inclined chute is not in here.

Q. You never did survey that? It is just put in to indicate where it was?

A. Yes.

Q. These floors from there on, when did you make the survey of those?

A. Those floor maps were made on the 26th.

Q. Of what month?

A. Of May.

Q. Of this year?

A. Yes.

Q. And where you show ladders and chutes, etc., it is as they were at the time you made your survey this last month?

A. With the exception of those ladders which—

Q. I mean on these floors now, and you have shown some ladders on the floors here. Those represent the conditions as they were when you made the survey the other day, or as Mr. Shaw and these men tell you it was there last fall.

A. They represent the position of the ladders as shown—

Q. In 1-b?

A. On 1-b.

Q. And do not pretend to represent a survey of the ladders last month?

A. No.

Q. The only thing that you do vouch for is the outline of those floors when you made the survey last month?

A. Yes.

MR. GRAY: That is all.

MR. WAYNE: That is all.

STEVEN SHAW, A WITNESS DULY CALLED AND SWORN ON BEHALF OF THE DEFENDANT, TESTIFIED AS FOLLOWS:

Direct Examination.

(BY MR. AILSHIE:)

Q. What is your name?

A. Steve Shaw.

Q. Where do you reside?

A. Mullan, Idaho.

Q. How long have you lived there?

A. Three years.

Q. Where are you employed?

A. The Gold Hunter Mining Company.

Q. How long have you been working there?

A. Going on close to two years.

Q. Were you working there last October, during the month of October?

A. Yes, sir.

Q. What position did you occupy there at that time?

A. Shift boss.

Q. Were you working there at the time the plaintiff was hurt?

A. Yes, sir.

Q. You knew him?

A. I knew him, yes, sir.

Q. How long have you known him?

A. I have known him about—oh, pretty close to two years.

Q. Has he been working there ever since you have been working there?

A. Yes, sir.

Q. Was he working under you on the night that he was hurt?

A. Yes, sir.

Q. When did you see him immediately before he was hurt?

A. About, I should judge, from a half to three-quarters of an hour, probably an hour, somewhere in there.

Q. Where was he when you saw him last?

A. On the fourth floor in the west 400 stope.

Q. What was he doing?

A. He was getting ready to go to drilling.

Q. I wish you would look at this plaintiff's exhibit 1 here and state if you can point out from it where he was at work. Now, he states that this is the east end and that is the west end of the stope. Now, if this is the east end and that the west end, about where would he have been working?

A. This is the east end?

Q. Yes.

A. And this is supposed to be the top floor, is it not?

Q. Yes, if this is the top floor?

A. And this is the west end?

Q. Yes.

MR. GRAY: It is just reversed from what it ought to be.

MR. AILSHIE: They put the west end in as east on this map.

Q. I have got to reverse it then?

A. Yes. Have you seen this exhibit?

A. This here, this map here, this is the west end, you understand?

Q. Yes.

A. This is the east end. This represents going to the shaft. This was on the sill, what we call the sill.

Q. Which would be the sill floor on this exhibit?

A. This one here.

Q. This one here?

A. Yes.

Q. Follow up now to where he was working?

A. He was working right in here.

MR. WAYNE: You had better have the record show that.

Q. What floor would that be on?

A. That would be on the fourth floor.

(BY MR. AILSHIE:)

Q. What was he doing at the time you saw him?

A. He was building a platform here to get ready to go to drilling.

Q. Who was with him?

A. John Holmi, was on the west side of him.

Q. Now, at that time, how long did you remain where they were working?

A. Oh, probably five or ten minutes.

Q. Then where did you go?

A. To the six hundred, what we call the six hundred level.

Q. When did you learn of his injury?

A. About a half an hour after it happened, after he went out.

- Q. Where did you learn of it?
- A. I was at the top station.
- Q. What did you do then?
- A. I went directly back down to the four hundred.
- Q. Did you send anyone to take his place?
- A. Yes, sir.
- Q. Who?
- A. George Ashland.
- Q. Did you go to the place where it was represented that the accident had occurred?
- A. Yes, sir.
- Q. What did you find there?
- A. Well, I found the machine there, and John Holmi back in the place where he was to work, and the machine down on the second floor at the east end of the stope.
- Q. Will you point out on that—better do so on this one—where the machine was?
- A. Right in here, the second floor.
- Q. Did you send anyone to get the machine?
- A. I did.
- Q. Whom?
- A. George Ashland.
- Q. Then what did you do? Where did you go then?
- A. I went on back down to the lower workings.
- Q. Did you examine the place where it was he claimed he was hurt?
- A. Yes.
- Q. What did you find there?

A. Well, I found a plank from the cap over to the ground.

Q. Point that out, if you can, on this map, defendant's exhibit 1-b, the plank that you found where he was hurt.

A. Right at the east end here from the third floor down to the end of the stope, not quite to the second, you see; it goes between the two floors. You can see the slant.

Q. Had you ever seen that plank there before?

A. No, sir.

Q. Had you ever been over it?

A. No, sir.

Q. Describe to the jury the way that plank, the position it was in, and the condition of the wall of the stope at that time?

A. That plank was from two feet to two foot and a half higher at one end than at the other, from the timbers down to the ground. Where it was on the timber, what he call the cap, the plank was two foot higher or two and a half, than it was on the ground, and that left it laying on a slant to the ground.

Q. Describe the ground, or the wall of the stope where it lay, or the ledge it lay on.

A. The wall of the stope, the end of the stope going east, as we come across on the floor here, there is always a little ore left, and that is taken out, and that is because of this what they call the bench at the end of the stope.

Q. What is the practice and the custom in that

mine, or in mines, running the floor and putting in the bents, with reference to filling up to the wall?

A. When there is room for a set we put it in; a set is six feet apart, between the caps, between the center of caps.

Q. It is the custom and practice to keep that filled in until there is a sufficient space for a full bent?

A. Yes, sir.

MR. GRAY: I object to that as leading and suggestive.

THE COURT: I think he may answer.

(Last question read.)

MR. AILSHIE: I meant set.

THE COURT: Perhaps you had better repeat that question. I doubt whether he understood it.

(BY MR. AILSHIE:)

Q. Was it the custom and practice in the mine, or is it the custom and practice in the mine, to put in additional timbering or floor until you have run for a full set?

A. No, it isn't the practice until we have run for the full set.

Q. In other words, then, you work out until you have run for a set, and then put it in?

A. Yes, sir.

Q. This space, was it wide enough or large enough for a set, where this piece was?

A. No.

Q. Did you go over that place that night after you examined it, that board?

A. Yes, at the time I examined it, yes.

Q. Did you go over it ascending or descending; did you pass over it going up or coming down?

A. I passed over it coming down.

Q. State how you went through the mine or through that stope that night, the direction and course you took, after you discovered that this accident had occurred.

A. THE COURT: You mean you came down over this after the accident?

A. Yes, sir. Well, I got off the cage at the 400 level. I goes west in the drift to the west man-way. I goes up to the third floor, and crosses over the third floor east to this plank; then I goes down the plank to where the machine was.

Q. In going across on this third floor, how did you travel? Taking plaintiff's exhibit 1, and suppose that this was the third floor here, that I point out, it is not marked at all—that is, as to which floor it is—but supposing this were the third floor here, how did you pass along here?

A. I came up this way and passed by here.

Q. How did you get by this ore chute?

A. Walked by.

Q. Describe the condition, and the opening there was there.

A. There was about two foot or two foot and six inches.

Q. In width?

A. In width.

Q. Between the wall and the—

A. Between the wall and ore chute.

MR. GRAY: I object to these leading questions.

THE COURT: Yes, avoid leading questions.

(BY MR. AILSHIE:)

Q. Now, state the size of that opening, both as to width and height, describe it.

A. Well, sir, at the bottom—you mean from the ore chute to the wall?

Q. Yes, between the ore chute and the wall.

A. The bottom was about two foot and a half, and the top wasn't so much; it was narrower at the top, probably eighteen inches.

Q. Any difficulty in getting through there?

A. No, sir.

Q. Now, describe the ore chute to the jury.

A. This here slide chute—

Q. I mean the slide chute.

A. Goes in at the top of the ore chute on the third floor, extending from the fourth floor, which means this floor up here, and to shovel into this slide chute, instead of throwing it back and down through this way, it was closer and handier to the shovels, so they put it into the slide chute, and it runs down and into this ore chute from the slide chute.

Q. How wide was the top of that slide chute?

A. The top of that slide chute was probably three foot or three foot six.

Q. How wide is the bottom of it where it goes to the ore chute?

A. About two feet or two feet three.

Q. Then there is about how much difference between the top of the ore chute where it rests on the tie above, or cross piece?

A. About a foot.

Q. And the bottom?

A. About one foot.

Q. And the slide chute was about a foot narrower at the bottom than at the top?

A. Yes, sir.

MR. GRAY: I object to that as leading and testifying and suggestive.

THE COURT: Yes, it is leading.

MR. AILSHIE: It is very easy to contract bad habits, and I fear I have done it already from counsel.

(BY MR. AILSHIE:)

Q. Mr. Shaw, where did you go after you passed by this ore chute? How did you travel then on that slide chute, I mean?

A. Coming back or going?

Q. As you went back.

A. I don't understand.

Q. After you came on to that floor and passed by the slide chute, then in which direction did you go, and where did you go from there, from the third floor?

A. As I was going to where this accident was?

Q. Yes.

A. Well, I came over to this east end—this represents the east end—I goes down here, and they explained where it happened, and come down to the second floor, here, of which I have already told you, over that plank.

Q. State, if you know, when that slide chute was

made there or repaired, or anything of the kind that was done to it.

A. That slide chute was made about two shifts before this accident.

Q. By whom?

A. By the shoveler and the carman.

Q. Who were they?

A. John Holmi and Joe Pellechier.

Q. How long before the accident, about, would you say?

A. Two shifts.

Q. Two shifts before?

A. Yes, sir.

Q. What time would that have been in the day, or what day would it have been?

A. I couldn't tell what day it was. I could tell about the day of the month, but I couldn't tell what day it was.

Q. How many shifts do you work in the mine in twenty-four hours?

A. Two shifts in 24 hours.

Q. Now, do you mean this was done the second shift in continuous order or the second shift preceding that they worked.

A. The second shift on our shift. That would be two shifts for us.

Q. What was the usual way of going from the ground floor or the third floor up to the place where the plaintiff was working that night?

A. Up the west end.

MR. GRAY: The usual way for him or—

MR. AILSHIE: For anyone working in that mine, what was the way for them to go?

A. The west end, the west man-way—

(BY MR. AILSHIE:)

Q. Describe now the way they would go on that map, point out.

A. We would come up first on the first floor, from the first to the second, and then from the second to the third.

Q. Indicate those places. What do you mean to indicate by those?

A. These are the ladders, man-ways.

Q. Then how would he travel from there?

A. He would have to—I don't really understand this map here. He would have to go to this end—

THE COURT: Can't you go ahead and tell?

MR. AILSHIE: This map is turned the other way.

A. He would have to go east from the third floor past this timber slide in here. He hasn't got it represented. And come over these ends—the ladder is here—went in behind where they were drilling, taking out the ground, this ladder here. This isn't a permanent ladder, this ladder. And after this set was put in on the west end this ladder should have been moved over here in a permanent place.
moved over here in a permanent place.

Q. That is after—

A. After it was timbered and the muck off of the floor above here.

Q. Now, taking this map here that you are ac-

customed to, will you point out the course that miners took in going to the places where these two men were working, the plaintiff and Holmi, that night?

A. This is the direct course, up this west sill here, this west man-way.

Q. State whether there were ladders there at the places indicated on this map, defendant's exhibit 1-b?

A. Yes, sir, there was ladders there.

Q. On the night of that occasion?

A. Yes, sir, there was ladders there.

Q. As indicated there?

A. Yes, sir.

MR. WAYNE: In the west man-way?

A. Yes, sir. They was there as indicated there.

(BY MR. AILSHIE:)

Q. How would he go from here when he reaches the third floor?

A. He would come east to this ladder over here.

Q. What is this? What does it represent here where it says "ore chute?"

A. This represents the rock chute, that they put the ore in from the stope.

Q. What is this, that is called "timber slide?"

A. This is timber slide, to take the timbers, steel, machines, anything they wish.

Q. State to the jury what that was used for at that time.

A. It was used to take timber up, machines, anything to go up that was necessary to go.

Q. State by what means you would take anything up and down, for instance, machines?

A. To save carrying it up on our shoulders.

Q. How would you get them up, elevate them?

A. There was a winch there at this time that extended to the third floor. This here wheel, that the rope went through, was up on the fourth floor, but the slide comes to the third and was taken up to third floor on this winch.

Q. What was the instructions to workmen with reference to taking tools and machinery and so on that they were working with up and down? Did they carry them up and down by way of the ladders, or did they take them in some other way?

MR. GRAY: I protest, Your Honor.

A. They have taken them both ways, but the instructions was to take them up this winch, timber slide.

(BY MR. AILSHIE:)

Q. Now then, from this point where would he travel in going to the place where he was working?

A. He would travel east.

Q. From the time he reached the third floor?

A. Yes, sir. Travel east to this man-way here, or this ladder, and then he would go up on the fourth floor here, to where he was working.

Q. State what the condition was at the time you passed this ore slide with reference to there being much ore rock or anything of that kind about it.

MR. HANSON: When, please?

MR. AILSHIE: Just state at the time he went by there at the time of the accident.

A. She was clean, all right, here at the time I went by, after the accident and before the accident.

(BY MR. AILSHIE:)

Q. How was it after the accident?

A. She was still clean.

Q. State what this represents on the third floor at the east here?

A. This represents a ladder from the third floor extending on up to the fourth floor.

Q. State whether or not that ladder was there that night.

A. Yes, sir.

Q. Whether or not it was there before the plaintiff went to work?

A. Before the plaintiff went to work?

Q. Yes.

A. It was there when I came through that night. As to whether he put it up there that night, or someone else—

Q. How long had there been a ladder there?

A. Every night, every day. This ladder is moved as they move the dirt back sometimes.

Q. In which direction were they working in drilling and mucking on the fourth floor?

A. They was going east, making a cut through new rock west.

Q. They were working—

A. Coming east on the cut, yes sir.

Q. Were you present, and did you hear the testimony of the plaintiff with reference to a conversation he had had with you?

A. Yes, sir.

Q. About a broken ladder, and his traveling to his floor over this plank?

A. Yes, sir.

Q. State if you ever had any such conversation with him.

A. No, sir.

Q. State whether or not he ever made any complaint to you.

A. No, sir.

Q. About it?

A. He did not.

Q. State whether or not you were aware that he or any other workman under you were traveling up and down over this plank?

A. Why, they travel—I didn't know anything of this plank until after the accident.

Q. Then, at the time of the accident, or at the time you went on duty that night, were you aware of their going up and down that way?

A. I knew they had went that way.

Q. Did you know how they had gotten up or down?

MR. GRAY: I object, if Your Honor please, as leading.

THE COURT: No, that isn't leading. The objection is overruled.

A. No, sir.

(BY MR. AILSHIE:)

Q. State what the purpose was of this so-called east man-way in this stope?

A. The so-called east man-way was for the purpose of coming to this rock chute on the east end, to come up on the first and second floor, from the first floor as high as the chute came.

Q. Explain to the jury how a stope like that is worked, that is, whether it is worked up or down.

A. It is worked up.

Q. So the first thing that was worked out was down where the sill floor is, and on up that way?

A. Yes, sir.

Q. Now, I will ask you about two indications on this defendant's exhibit 1-B, of two ladders on the sill and first floor to the east end. What was the purpose of these?

A. The purpose of those was to come up for the purpose of this chute in here, muck on this east end.

Q. In what way did you manage to clean the ore chute if at any time it was—

A. Well, we would have to have a mill hole here, a hole into the chute.

JUROR: Let him use the other map. We can see that lots better than this.

(BY MR. AILSHIE:)

Q. On this map marked plaintiff's exhibit 1, where would the line marked "plank" on defendant's exhibit 1-B be, can you point it out?

(Witness did so.)

Q. It would be on what is marked the east end of this map here?

A. Yes, sir.

MR. AILSHIE: I don't know whether it is—

MR. GRAY: Yes, it is marked east and west, Judge.

MR. AILSHIE: That is all.

CROSS EXAMINATION.

(BY MR. GRAY:)

Q. Now, you knew there was this broken ladder between the second and third floors, didn't you?

A. No, sir.

Q. You didn't know that?

A. Not at this time, no sir.

Q. When did you first discover that?

A. Because there wasn't no ladder between the second and third floor?

Q. Could you tell the jury when you did discover it?

A. There was no ladder there.

Q. There was no broken ladder there?

A. Not on the second and third floor.

Q. Between the second and third?

A. No, sir.

Q. Now let us take this little map that you have been using.

A. Yes, sir.

Q. What is this ladder shown over in the east breast there, laying up against the breast, and running up to the bench?

A. I couldn't tell you what it was laying here for.

Q. When was it laying there?

A. This was on the second floor.

Q. I asked you when it was lying there.

A. It is lying there at the present time.

Q. Was it at the time of the accident?

A. I couldn't—

Q. Didn't you tell the surveyor who made this that it was lying there at that time?

A. No, sir. This is the second floor and this is the third floor.

Q. And this ladder lying there up to the bench, was that there at that time?

A. No, sir.

Q. It was not?

A. No, sir.

Q. You know when it was put there?

A. No, sir.

Q. Now, the ore chute was how—

MR. AILSHIE: Will you indicate on that how—

(BY MR. GRAY:)

Q. Laying against the bench on the east end from the second to the third floors. From the bottom of the first floor, then up above the second, this one here, so the jury can see it.

A. That is on the second floor, is it not?

Q. Yes, that is the one.

A. Yes, that is on the second floor.

Q. Was that there at that time?

A. Yes, sir.

Q. It was at that time?

A. Yes, sir.

Q. What was it doing there?

A. This was there, I suppose they put it there to come up on the third floor.

Q. You suppose they put it there?

A. Yes.

Q. You had charge of that stope?

A. I had charge of that stope.

Q. And of the ladders and man-ways?

A. Yes, sir.

Q. And that ladder was put there, was it, at the time of the accident?

A. That ladder was not put there by orders from me.

Q. I know, but it was there, was it?

A. Yes, sir.

Q. And had been there for some time prior to the accident, had it?

A. I couldn't say how long.

Q. You don't know how long?

A. No, sir.

Q. A day or two?

A. Probably so.

Q. When had you seen it?

A. I had seen it this night.

Q. Had you ever seen that before?

A. No, I hadn't been over there.

Q. You never went over that way at all?

A. Not very often.

Q. How long since you had been over there?

A. I came over this way and back again two or three times every night.

Q. Over to the face?

A. Yes, sir.

Q. Over to the east breast two or three times every night?

A. Yes, sir.

Q. And you had been doing that right along?

A. Yes, sir.

Q. How wide was this ore chute across the vein or stope?

A. How wide was the stope?

Q. Yes, the ore chute?

A. You mean the lead?

Q. Well, I think that is perfectly plain. How wide was the ore chute across the stope?

A. The rock chute extended across the vein.

Q. From wall to wall?

A. Yes, sir.

Q. And it was the same width on the first floor as on the second and on the third?

A. Yes, sir.

Q. It extended, in other words, from wall to wall.

A. Yes, sir.

Q. And how long was it along the course of the stope, from set to set, wasn't it?

A. Yes, sir; six feet.

Q. Six feet?

A. Yes.

Q. Now then, this slide chute, you say that was made two nights before the accident?

A. Yes, sir.

Q. Were you there at the time?

A. No, sir.

Q. The ore chute made by taking out the timbers between a set?

A. No, sir.

Q. The rock chute?

A. No, sir. They don't take out timbers to make it.

Q. They don't put them in, do they?

A. Yes, they put the chute in.

Q. You said something about there being a couple of feet to walk along beside the chute there.

A. On the top, yes, on the third floor.

Q. On the third floor?

A. Yes, sir.

Q. Where was that—on the hanging or foot wall side?

A. That would be on the foot wall side.

Q. On the foot wall side?

A. Yes, sir.

Q. Which way did that vein dip?

A. It was a fissure vein.

Q. Just tell which way it dipped?

A. It dipped a little to the foot.

Q. How?

A. It slanted to the foot as she went up.

Q. As she went up?

A. Yes.

Q. In other words, it dipped downward?

A. Yes, sir.

Q. In what direction?

A. That would be the hanging—

Q. Oh—

MR. AILSHIE: I object to this, and take exception to the comments and remarks and groans of counsel over the witness' testimony, and I desire my exception noted.

MR. GRAY: I submit there is nothing improper.

THE COURT: Mr. Gray, there is really no rea-

son why you should by movement of the body or arm, or by a groan, or in any other way, comment upon the testimony of the witness. Now, I think perhaps it is a habit rather than intentional. If I thought it was intentional, I should be much more severe, but I must insist that these cases be tried in a fair and straightforward way.

MR. GRAY: I am trying to do that, Your Honor, I simply think the witness don't understand me, that is all.

THE COURT: Yes, but there is no reason why, when a witness answers a question, you should in any way, either directly or indirectly, comment on it.

MR. GRAY: I don't intend. I am trying to treat him just as fairly—

(BY MR. GRAY:)

Q. As you went down into the earth, did it dip southerly or northerly?

A. It dipped southerly.

Q. Dipped southerly?

A. Yes, sir.

Q. Now then, you say that you could pass on the foot wall side of that slide chute?

A. Yes, sir.

Q. And you said there was how much room between that and the wall?

A. Two feet.

Q. How large was this post that was in that set of timbers there?

A. I should judge—about—that would average ten to twelve inches.

Q. Where was this two feet—behind the post, or—

A. Before the posts, between the posts.

Q. Between the posts and the slide chute?

A. Yes, sir.

Q. How wide did you say that slide chute was there on the third floor?

A. Two feet.

Q. Two feet?

A. Two feet, or two feet and a half.

Q. Was it possible to get behind the post, between that and the wall?

A. No, sir.

Q. You said something about the usual way the miners went. Did you give any instructions to the miners as to which way to go up in this fourth floor?

A. No, sir.

Q. Had you gone up with Mr. Johnson any time?

A. No, sir.

Q. Had you gone up with Mr. Holmi any time?

A. No, sir.

Q. Do you know which way they went?

A. No, sir.

Q. Isn't it true that there had been a ladder here from the second to the third floor before that accident?

MR. WAYNE: In which end?

MR. GRAY: Over here in the east end.

A. There was a ladder from the second to the third floor, yes.

(BY MR. GRAY:)

Q. But wasn't there one here from the—from the second to the third?

A. You just asked that.

THE COURT: Answer the question.

A. Yes, sir, from the second to the third.

(BY MR. GRAY:)

Q. It had been there before the accident?

A. Yes, sir.

Q. Well, was that there that night?

A. Yes, sir.

Q. In good condition?

A. No, sir.

Q. What was its condition?

A. It was partly covered up at the top that night.

Q. Partly covered up at the top?

A. Yes, sir, the man-way. There was some rock and drift over the top of it.

Q. Over the top of the man-way?

A. Yes, sir.

Q. The ladder wasn't broken?

A. I couldn't say whether it was or not that night.

Q. The night of the accident?

A. No, sir.

Q. Had you seen it the night before?

A. No, sir. I hadn't been that way the night before.

Q. Hadn't you been up in that stope the night before?

A. I was, sir.

Q. But you weren't over in the east end the night before?

A. Yes, sir.

Q. But not on the second floor?

A. No, sir.

Q. About this timber chute that you spoke of, did you say they took machines up that timber chute?

A. Yes, sir.

Q. Couldn't get them up to the fourth floor that way, could you?

A. No, sir.

Q. Or to take one down that way?

A. No, sir.

Q. Had you given Mr. Holmi any such instructions?

A. No, sir.

Q. How many men did it take to work that windlass down there, or whatever you call it?

A. One man can work it by himself, or two men can work it.

Q. Doesn't it really take two men to work it down at the bottom, and another man up above?

A. No, sir.

Q. It doesn't?

A. The windless, on the second floor—

Q. One man can handle that, can he?

A. Yes, sir.

Q. Could he handle it and lift a machine up?

A. They would have to hook the machine on to the chain, and then go up and windlass it up.

Q. That would be as far as the second floor?

A. That would be as far as the third floor.

Q. That timber chute didn't extend through to the fourth floor?

A. It did afterwards, yes.

Q. Well, I mean at the time of the accident.

A. No, sir.

MR. GRAY: That is all.

RE-DIRECT EXAMINATION.

(BY MR. AILSHIE:)

Q. I will ask you to state to the jury what the first—what is designated as the first floor on both of these maps, to which you have referred, plaintiff's exhibit 1 and defendant's exhibit 1-B, represents?

A. You want me to name the floors?

Q. Yes, to name them.

A. The first floor represents the sill, the sill floor.

Q. Is that true on this map also?

A. Yes, sir. This is the sill; that is the drift, the sill floor.

Q. That is on a level with the drift?

A. Yes, sir.

Q. Now then, proceed. They come in numbers one, two and three?

A. Yes, sir.

Q. Then the one indicated as the second line here, the lower line, on each of them, is—

A. Is the first floor.

Q. The first floor of this stope?

A. Yes, sir.

Q. Now, will you point to the place where you stated to counsel the ladder was, that the top of it was covered by muck and rock?

A. That was this one here, from the first to the second.

Q. And that is the place that you had in mind when you referred to counsel—in answer to counsel's question?

A. Yes, sir.

Q. And is this the one that you said was partially—may have been broken, or—

A. Yes, was covered on top.

MR. GRAY: I object, if Your Honor please. He didn't say it was broken.

THE COURT: No, he said he didn't know whether it was broken or not, Judge Ailshie.

MR. AILSHIE: I didn't intend to—he said he didn't know, as I remember it.

(BY MR. AILSHIE:)

Q. Now, was there any other ladder that you know of, or do you know, or did you know, of any other ladder on either the second or third floor that was broken or out of order that night?

A. No, sir.

Q. Now, in answer to a question by Mr. Gray, you said that the ore chute filled the entire space from wall to wall, as I understood you?

A. Yes, sir.

Q. I wish you would explain to the jury what you mean by that.

A. We raised the—the chute there, the stope is

a narrow stope. As we raised the chute up, we raised from cap to cap on each end, as we run endways, and that would extend the chute crossways from wall to wall.

Q. I am going to ask rather a leading question here. Was the chute built inside the timbers?

A. Yes, sir.

Q. Then that made the chute about how wide?

A. About five feet.

Q. About five feet?

A. Yes, sir.

Q. What was the condition of the top or opening of the chute on the third floor, where the ore slide entered it?

A. She was open on the hanging wall side.

Q. And what was its condition on the other side?

A. She was covered.

Q. Now, in passing there, which way did you pass?

A. Passed on the foot wall side.

Q. On the foot wall side?

A. Yes, sir.

Q. What, if any, danger was there in passing there that night, or when work was going on there?

A. None at all.

MR. GRAY: That is a conclusion, Your Honor; I think the jury could quite as well draw the inference as the witness.

THE COURT: Well, he has answered. You may cross-examine him.

MR. GRAY: I didn't get his answer.

THE COURT: He said none at all.

(MR. AILSHIE:)

Q. You were asked if you gave any instructions to either the plaintiff or others as to which way they should go up that night?

A. No, sir; I did not.

Q. Was it the custom to give instructions of that kind to experienced miners?

A. No, sir; it wasn't.

MR. GRAY: If Your Honor please, that wasn't exactly what he said.

THE COURT: He was asked whether he had ever given any instructions to his men, as I understand it.

MR. AILSHIE: I took it I had a right to limit it to any one time within that period.

THE COURT: Proceed.

(BY MR. AILSHIE:)

Q. Was the plaintiff what you designate an experienced miner?

A. Sir?

Q. Was the plaintiff here, Mr. Johnson, an experienced miner?

A. Yes, sir.

Q. Do you know who placed the board, or lagging, I believe is what you call it, that board across from the cap to the wall?

A. No, sir.

Q. You don't know who placed that there?

A. No, sir.

Q. Who was the mucker for the plaintiff that night?

A. John Holmi.

Q. What is the duty of a mucker?

A. A mucker is supposed to shovel the rock in the chutes.

Q. And the plaintiff was a—

A. A miner.

Q. Who was the nipper that night?

A. Jackie Lamberton.

Q. Who was running the cage that night in the mine?

A. William Opie was cager.

Q. Was there a man working there named Pellecier?

A. Yes, sir.

Q. What was he working at?

A. He was a kind of a roust-about, all-around man, for carmen or shoveler, whatever was to be done.

Q. Was he working on your shift?

A. Yes, sir.

MR. AILSHIE: Take the witness.

RE-CROSS EXAMINATION.

(BY MR. GRAY:)

Q. Now, Mr. Shaw, isn't it a fact that it is your practice, both in that mine and where you have minded elsewhere, to have at least two man-ways up into a stope?

A. Not always.

Q. Well, wasn't it your practice there, your general practice?

A. No sir, not at that stope.

Q. I didn't ask you about this stope. Just take the mine.

THE COURT: Generally speaking, counsel wants to know if that isn't the general practice?

A. Yes, sir.

(BY MR. GRAY:)

A. And the men are accustomed to go through either one man-way or the other?

A. Yes, sir.

Q. Unless they are instructed to the contrary?

A. Yes, sir.

Q. You had given no instructions not to use this east man-way, had you?

A. This east man-way was only for the convenience of the chute, and not for the miners.

Q. Well, I say you had given no instructions not to use it?

A. No, sir.

Q. About this chute, you said something about this chute being covered on the foot wall side?

A. Yes, sir.

Q. It was open clear over to the wall on the other side, was it, that is, there were no timbers over the top of it on the hanging wall side?

A. It wasn't open clear to the wall on the hanging wall side.

Q. How close?

A. There was a collar brace in there between

the cap and the plank, probably would be twelve inches.

Q. There wasn't a place any wider than eight inches from the wall out over that chute, or along where it was, was there?

A. Yes, sir.

Q. How wide?

A. Two foot and a half.

Q. You say it was covered for two feet and a half there?

A. Yes, sir.

MR. GRAY: That is all.

RE-DIRECT EXAMINATION.

(BY MR. AILSHIE:)

Q. Which side did you say this covering was?

A. On the foot wall side.

Q. On the foot wall side?

A. Yes, sir.

MR. AILSHIE: That is all.

MR. GRAY: That is all.

JOHN LAMBERTON, A WITNESS DULY CALLED AND SWORN ON BEHALF OF DEFENDANT, TESTIFIED AS FOLLOWS:

Direct Examination.

(BY MR. WAYNE:)

Q. Will you state your name?

A. John Lamberton.

Q. Where do you reside?

A. Mullan, Idaho.

Q. What is your occupation?

A. Well, I am the nipper at the Hunter.

Q. At the Hunter mine?

A. Yes sir.

Q. Were you working there in the month of October, 1914?

A. Yes sir.

Q. And on the night that Mr. Johnson was injured?

A. Yes sir.

Q. I will ask you to state whether or not at any time on that shift, but before Mr. Johnson was injured, you had been on the fourth floor of the four hundred stope west?

A. Yes sir.

Q. What had you been up there for?

A. I went up there to pick up the dull steel.

Q. That is the duty of the nipper?

A. That is my duty, yes sir.

Q. To go up to the different stopes and get the steel and take it down to be sharpened?

A. Yes sir.

Q. Had Mr. Johnson gone to work or was he when you was up there on the fourth floor that night?

A. He was up on the fourth floor. He was barring down the loose ground, I guess, before he started to drill.

Q. Before he started to drill?

A. Yes.

Q. How did you go up to the fourth floor that night?

A. I went up on the east man-way.

Q. And you knew of the existence of the plank there, did you?

A. Yes sir.

Q. Did you go to that way?

A. I did.

Q. Will you state whether or not there was any other way of going up to the fourth floor?

A. Yes sir, on the west end.

Q. The west end?

A. Yes sir.

Q. How would you go up at the west end?

A. Well, I guess this is the west end?

Q. Yes?

A. You go—this is the first man-way, this is the sill floor; this is the first floor; go up to the second floor and up to the third floor.

Q. Just a minute. You go up then in the west man-way?

A. Yes sir.

Q. From the sill floor to the third floor?

A. To the third floor.

Q. And from there where would you go?

A. I go over this way past this chute, and over to this manway on the east end.

Q. And up the man-way at the east end to the fourth floor?

A. Yes sir.

Q. Now, to go up that way you would have to go by the slide chute, and the timber chute, would you not?

A. Yes sir, the timber slide would be here about. It ain't marked on this map?

Q. But it was just west of the slide chute?

A. Yes. I don't know whether it was one or two sets, two sets, I think.

Q. Will you state to the jury whether or not you had any difficulty in going by the slide chute?

A. I didn't go that way, you see, that night that the accident occurred.

Q. At other times?

A. No; I pased that way before all right.

Q. MR. GRAY: I don't think some other time would be a proper test.

A. The night—

MR. GRAY: Unless it were after the accident.

A. The night before, even; but this night I went up on the east end, that the accident occurred.

(By MR. WAYNE.)

Q. How did you come down that night?

A. I come down the same way.

Q. The night before, when you went by the slide chute, how much space was there to go by it?

A. Oh, I should say about two feet.

Q. On what side?

A. On the foot wall side.

Q. On the foot wall side?

A. Yes sir.

Q. Did you notice that slide chute, as to the manner in which it was constructed, how it was constructed, how it was built, what shape it was?

A. It was built from the fourth floor to the third floor.

Q. As to the size of it both at the top and at the bottom?

A. Well, I couldn't tell exactly the size of the chute.

Q. In going by this chute on the foot wall side, what were you walking on?

A. Walking on plank, and naturally a little dirt, that drops over the slide chute, you know, drops on the floor.

Q. Where were you at the time that Mr. Johnson was injured?

A. I was on the 800 level.

Q. And how soon after his injury did you see him?

A. Well, I couldn't tell exactly. It was about seven o'clock I guess, when I see him.

Q. And where?

A. On the 400 level.

Q. How had you gotten to the 400 level?

A. I flashed to the cage on the 800 level; I want to go on top. And during the time I was coming from the 800 to the 400 I guess Mr. Johnson flashed for the cage, and the engineer stopped, and Mr. Johnson got on.

Q. I will ask you to state if after Mr. Johnson was injured you went to the place where he was injured?

A. How soon after you saw him?

A. Yes.

A. Maybe two hours after.

Q. I will ask you to state if you examined that plank or that lagging at that time?

A. No sir.

Q. You didn't?

A. Just walked up over it, the same as I did before.

Q. What was its condition as to being in place or otherwise?

A. It was the same as I had seen it the first time I went up.

Q. How did you come down out of the fourth floor?

A. Down the same way.

Q. Mr. Lamberton, do you know the size, or the weight, rather, of these Ingersoll hammer drills?

A. I should judge about 75 pounds.

Q. What would you say as to whether or not a man could pass that slide chute while carrying one of these drills?

A. Well, yes, he could.

Q. Was there any other way provided for talking drills from the level to the floors above, other than carrying them up?

A. Yes sir.

Q. What means?

A. A conveyance for that purpose.

Q. What conveyance?

A. A timber slide.

Q. How would you get them up in the timber slide?

A. Well, they had a winch there, you know, what they call a hand winch, on the second floor.

Q. Just exactly how did you fasten the machine on and take it up?

A. Well, you tie it on to the end of the chain, and the two men, if one couldn't do it, could go to the second floor, and the third floor, and one man could go up and hold it, while the other would take it off, but one could hoist up one of those hammer drills very easily.

Q. This winch you speak of was nothing but a windlass?

A. Just an ordinary windlass.

Q. Wound up with a rope on the end of it?

A. Yes sir.

MR. WAYNE: Take the witness.

CROSS EXAMINATION.

(By MR. GRAY.)

Q. That was really put in to hoist timbers up for timbering the mine?

A. Yes sir.

Q. That was why they called it a timber chute?

A. Yes sir.

Q. Was this plank you walk over that night nailed to that post?

A. I couldn't tell.

Q. You don't know?

A. I don't know.

Q. Do you say, Mr. Lamberton, that you went by that slide chute the night before?

A. Yes, sir.

Q. Isn't it true that you came up to it the night before and called out, and after Holmi called down to you you went back around the other way?

A. Not the night before, sir.

Q. Did you on this particular night?

A. I did one night, I remember, but I could get by there, but I didn't want to stop the men from throwing the rock down the chute, you see.

Q. That is the reason you went the other way, is it?

A. Yes, that is the way I went back, you see.

Q. Did the men stop shoveling while he talked to you?

A. I shouted out to him—yes, he stopped, certainly he did.

Q. The rock wasn't rolling down there then, was it?

A. No, not down the chute, no.

Q. Why didn't you go through then?

A. Because I preferred to go down the other way, I guess. He just opened that chute then, you know, and it didn't look very nice to go through there then. It makes lots of difference, you see.

Q. It gets safer, does it?

A. Oh, I don't know.

Q. Then you went back and went down those ladders, and came around and came up this way?

A. No sir.

Q. How did you go?

A. I don't think I went up there that night, if I remember, I think Johnson told me there wasn't any steel up there that night. Didn't you, Johnson?

THE COURT: No.

MR. GRAY: That is all.

MR. WAYNE: That is all.

MR. GRAY: I want to ask Mr. Shaw one other question.

MR. SHAW recalled.

CROSS EXAMINATION.

(By MR. GRAY.)

Q. Was the plank nailed to the cap?

A. I don't know, sir.

Q. Didn't you examine it there?

A. I looked at the plank, yes sir.

Q. And you can't tell whether it was or not?

A. No sir.

MR. GRAY: That is all.

JOE PELLECIER, A WITNESS DULY CALLED AND SWORN ON BEHALF OF PLAINTIFF, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION.

(By MR. WAYNE.)

Q. Will you state your name?

A. Joe Pellecier.

Q. Where do you live?

A. I don't know what you mean.

MR. WAYNE: It appears that we will have to use an interpreter with this man.

THE COURT: Is he French?

MR. WAYNE: He is an Italian, but he speaks French. I have a man here who is also a witness that can speak French.

MR. GRAY: We object to it. Mr. Hanson says this man talks pretty good English.

MR. WAYNE: I object to the statement of counsel, and assign it is prejudicial, if Your Honor please. It is a question for the court to pass upon.

MR. HANSON: Counsel had a long talk with him upon the wharf at Harrison, in my sight; I saw him.

MR. WAYNE: I object to that statement of counsel, and assign that as prejudicial.

THE COURT: Yes: The jury will not be influenced by this. I don't know how a conversation in your sight would help very much. If it was in your hearing it might be different, Mr. Hanson. I think we will try to find out what the fact is. I trust the jury will not be influenced by these statements. What we are trying to get at is the truth, and get along as fast as possible.

THE COURT:

Q. Mr. Pellecier, are you a Frenchman or Italian?

A. An Italian.

Q. You speak French?

A. Yes.

Q. How long had you been in this country?

A. Four years and a half.

Q. Are you a married man?

A. No sir.

Q. You have been in the United States four years and a half without going back to the old country?

A. Yes sir.

Q. Now, if the questions are put to you in a sim-

ple way, you could understand them pretty well, couldn't you?

A. Not very much.

THE COURT: I think you will understand pretty well. I will ask the counsel to make the questions single and simple, and then you speak out pretty loud. It will take a long time for us if we have an interpreter, and I would like to have you do the best you can.

(By MR. WAYNE.)

Q. Mr. Pellecier, where do you live?

A. Mullan.

Q. You are working at the Old Gold Hunter Mining Company there?

A. Yes.

Q. You know Mr. Johnson, do you?

A. Yes sir.

Q. You were working on the same shift with him when he was hurt?

A. Yes sir.

Q. What were you doing?

A. I was carman there.

Q. What does a carman do? What were your duties? What did you do?

A. Take the muck off of the ore chute.

THE COURT: If you understand him, Mr. Wayne, you may repeat his answer.

(By MR. WAYNE.)

Q. You also did mucking, did you?

A. Some, yes.

Q. Had you ever mucked up on the fourth floor to this chute where Johnson was hurt?

- A. Yes sir, a little bit.
- Q. And how long before he was hurt had you been mucking up there.
- A. The night before.
- Q. The night before?
- A. Yes sir.
- Q. How did you go up and come down to and from the fourth floor?
- A. I went up here, on the west end, and then go by here, on the fourth floor, go by that way there.
- Q. You went up the man-way at the west end?
- A. At the west end.
- Q. How far up?
- A. Three floor high.
- Q. And then when you got to the third floor where did you go?
- A. Go over on the east end.
- Q. Up to the ladder way at the east end?
- A. Yes sir.
- Q. And then up that ladder to the fourth floor?
- A. Yes sir.
- Q. Now, to do that you had to pass by a slide chute?
- A. The slide chute, yes sir.
- Q. Do you know who built that slide chute?
- A. I built it.
- Q. You built it?
- A. Yes sir.
- Q. Anybody help you?
- A. Mr. John Holmi.
- Q. When did you and Holmi build it, when, what night?

A. About a couple of nights before he got hurt?

Q. And you say a couple of nights before he got hurt?

A. Yes sir.

Q. How was that slide chute built, just describe it?

A. How wide?

Q. Yes, how wide was it?

A. About two feet and a half, something like that.

Q. Where,—on the top or the bottom?

A. The bottom.

Q. How wide was it at the top?

A. It was a little wider, about a foot or more wider.

Q. About a foot or more wider at the top?

A. Yes sir.

Q. Do you know why it was made narrower at the bottom?

A. I don't.

Q. Do you know why it was not so wide at the bottom?

A. I don't understand.

THE COURT: Why was it wider at the top?

A. Because, you see, the hole on the top was a little lower on the foot wall, and the hole below was a little over on the other side, you see, had to make it a little wider on top.

Q. Now, in passing this slide chute, which side of it did you go by on?

A. On the foot wall.

Q. And how much space did you have?

A. About two foot, something like that.

Q. Two feet?

A. Yes.

Q. And what were you walking on as you went by the slide chute?

A. On the foot wall.

Q. What were you walking on dirt or —

A. You have a little dirt that come off on the slide as you go down, jump off from the slide.

Q. Were there lagging in there?

A. Yes, lagging below, in the bottom.

Q. And the dirt on top?

A. Yes sir.

Q. Now, you have seen Ingersoll Hammer Drills, haven't you?

A. How?

Q. You have seen these Ingersoll Hammer Drills, the machine drills that they used up there?

A. Yes sir.

Q. What would you say as to whether a man carrying one of those drills could pass that slide chute on the third floor, on the foot wall side?

MR. GRAY: On the night of the accident?

MR. WAYNE: Yes.

A. Yes, he can go by all right.

(By MR. WAYNE.)

Q. Mr. Pellecier, were you on the fourth floor at any time on the night that Johnson got hurt?

A. I been up when he go in, in the mine, before they started to run the car.

Q. Had you gone clear up to the fourth floor that night?

A. That night I don't remember what way I went up, I couldn't tell now.

Q. Did you go clear up to the fourth floor?

A. Yes, I went up on the fourth floor.

Q. You don't know which way you went that night?

A. No, I don't remember which way I went up.

Q. Did you go through a place over at the east end of that stope on a piece of lagging?

A. Yes.

Q. Who had told you of it?

A. Nobody that I remember.

Q. Well, were you ever told by John Holmi that there was a plank there?

A. No sir.

MR. GRAY: I object to that, if Your Honor please. Your Honor sustained an objection to my question to Johnson about that.

MR. WAYNE: Well, there was a different reason for that. It isn't at all important, if Your Honor please, how Holmi found out about this, we have a right to impeach him, while plaintiff's counsel has not.

MR. GRAY: That isn't impeaching him.

MR. WAYNE: Holmi said the first he knew of the plank was when either Johnson or Pellecier had told him. I simply want to show that it was not Pellecier that told him.

MR. GRAY: I wanted to show that it was not Johnson. I think it is rather immaterial either way.

THE COURT: It doesn't seem to be very material, I did not understand that the answer—that is that the answer to which you now direct his attention was in just that form. I think, if that be your purpose, I shall permit you to ask the question, and permit the plaintiff, if he desires, to testify in rebuttal. I don't quite see the importance of it even now, but if you go into it at all, of course, I shall let the plaintiff testify upon the same subject.

MR. GRAY: I object to it as immaterial. I don't think it is material. I couldn't see at the time—

THE COURT: Well, the matter has been opened up, and I shall let you go into it that way. I am not quite clear as to just how it is material, but I presume you both thought it was material at one time. You may ask the question. And then Mr. Gray, you may recall the plaintiff later on.

MR. WAYNE: I will reask the question.

(By MR. WAYNE.)

Q. Did you tell John Holmi about there being a plank there?

A. No sir.

Q. Why did you use to go up this plank?

A. MR. GRAY: That, if your Honor please, as to why he did it, would be calling for something that would be immaterial.

THE COURT: What is your purpose, Mr. Wayne?

MR. WAYNE: Merely to show that it was a matter of convenience rather than necessity.

THE COURT: The objection is overruled.

(By Mr. Wayne.)

Q. Why did you use this plank at all?

A. I don't understand.

MR. WAYNE: That is all.

CROSS EXAMINATION.

(By MR. GRAY.)

Q. Were you down at that slide chute that night, the night he was hurt, were you down here at the slide chute the night that Johnson was hurt?

A. Yes sir, the chute was broken when I went up in the stope, and me and Mr. Holmi fixed him up again.

Q. That was after the accident?

A. No, before they started work, the same day.

Q. John Holmi was a carpenter, wasn't he?

A. Yes sir.

Q. That was the slide chute?

A. The slide chute.

Q. How about the lagging, the boards up in front of the slide chute, any of those broken?

A. In front of the slide chute, they have a hole to go down the chute.

Q. How wide was that hole?

A. Oh, a couple of feet, something like that.

Q. Wasn't it more than two feet?

A. Something like that. I can't tell for sure how much he was.

Q. You are still working up there?

A. Yes.

RE-DIRECT EXAMINATION.

(By MR. WAYNE.)

Q. Mr. Pellecier, did you say that you were over to the slide chute on the third floor the night that Johnson was hurt?

A. Walk over there?

Q. Were you up there at all that night?

A. Yes sir.

Q. Over at the slide chute?

A. I had been up there before I started to work, the same day.

Q. And you could get by there then?

A. Yes sir. I fixed the slide there then.

Q. You fixed the slide?

A. Yes, me and John Holmi.

Q. In fixing the slide, did you go in and around it?

A. I been on top on the fourth floor before I go down and run the car.

MR. WAYNE: That is all.

MR. GRAY: That is all.

GEORGE ASHLAND, A WITNESS DULY CALLED AND SWORN, ON BEHALF OF THE DEFENDANT, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION.

(By MR. WAYNE.)

Q. State your name?

A. George Ashland.

Q. Where do you live?

A. Mullan, Idaho.

- Q. How long have you lived there?
- A. I have been there since 1901.
- Q. Where do you work?
- A. At the present time at the Hunter.
- Q. How long have you worked at the Hunter?
- A. Between eighteen, seventeen and eighteen months.
- Q. What is the kind of work you do?
- A. Miner.
- Q. What kind of a miner?
- A. Machine man.
- Q. Do you know Mr. Johnson, the plaintiff?
- A. Yes sir.
- Q. I will ask you to state where you worked in the Hunter mine on the 17th of October, which was the night he was hurt?
- A. I was on 600 first, when I started to work.
- Q. Did you work on any other level that night?
- A. Yes sir.
- Q. What level?
- A. 400 level.
- Q. And what floor on the 400 level?
- A. Fourth floor.
- Q. In which stope?
- A. In that 400 stope.
- Q. The stope where he was injured?
- A. Yes sir.
- Q. How did you happen to go up there?
- A. Mr. Shaw come after me and told me to go up there, the man was hurt.
- Q. You went up then and took Johnson's place?
- A. Took his place.

Q. Will you tell the jury where you got the drill?

A. I got the machine on the first floor, at the east end, and I took the machine up that way. I seen there was another ladder there, and I went up, and after that I didn't find no more ladders.

Q. Just a minute. How did you take the machine up? Which way did you go?

A. Here, I went up that way, and here there was no ladder, over here.

Q. You went up to the third floor on the—to the second floor, on the ladder, is that right?

A. Yes, right there, there was no more, from the sill up to the —

Q. To the second floor, you went by way of the ladder in the east man-way?

A. Yes sir.

Q. Then you say you found no ladder on the second floor, from the second to the third floor?

A. No sir.

Q. Where did you go then?

A. I walked over there, and there was a bench there, and I climbed up on that bench, and up on that plank through there, went up on the fourth floor.

Q. You went east on the second floor to the bench of rock, up the bench—

A. Yes.

Q. Up the lagging?

A. Yes.

Q. To the third floor?

A. Yes.

Q. And then up the ladder to the fourth floor?

A. Yes sir.

Q. Who was up there when you got there?

A. John Holmi.

Q. What was the condition of this plank or lagging when you went over it?

A. It lay flat on top of the cap, and down to the bench against the face.

Q. How much lower was the lower end of the lagging than the upper?

A. Oh, about a couple of feet, I guess, that is about all.

Q. And what size lagging was it?

A. I think it was a foot wide, if I remember right, it was a foot wide.

Q. And how thick?

A. Two inches.

Q. How long?

A. About six feet.

Q. Now then, did you have occasion to go to the sill floor any other time that night?

A. No, I didn't go any more that way.

Q. Did you go to the sill floor at all?

A. Oh, yes, I did.

Q. How did you get down?

A. After I find out—I tried the machine, the machine was leaking, and then I loosened the side around, and I picked it and find out she working fine, and then I look for steel, and then I come back this way—I come down this ladder.

Q. In the east end?

A. Yes sir, then I come this way.

Q. To the third floor?

A. Yes sir, and I find the timber slide was covered with planks, to protect the people from falling in these, and then I took a plank up, you know, I took them out so I got my steel down in, and I come down here right along side that slide chute, and down to this man-way.

Q. You came past the slide chute to the west man-way, and down that to the sill floor?

A. Yes sir.

Q. I will ask you to state to the jury whether or not you had any trouble getting by this slide chute?

A. No, didn't have no trouble to go by.

Q. How much space was there between the slide chute and the wall of the stope?

A. It was over two feet, I know, over two feet.

Q. Do you know the size of these hammer drills that were used there?

A. Yes sir.

Q. State to the jury whether or not there was room for a man carrying a hammer drill to go by that chute?

A. Any place where a man goes you can pass three or four of those machines, because they are not more than six or seven inches, the biggest the machine, and about four feet long.

Q. Which side of the slide chute did you pass on?

A. I find the slide chute there; it has got two planks on the bottom, one on each side, and the planks was about twelve inches, and it was two inches thick. It would make about 28 inches wide.

Q. Which side did you pass on?

A. On the foot wall side.

Q. And as you walked by the slide chute, what were you walking on?

A. I was walking on the plank there, and some timbers they put over the ore chute, round timber, called the grizzly, over the chute. That is the name they call it, that is to make the hole small.

Q. Now, how many shifts did you work there afterwards?

A. That is the only night I worked there. I worked before that, about two weeks before that.

Q. What would you say as to the condition of the third floor as you passed the slide chute, so far as any loose muck, dirt, or rock was concerned.

A. There was very little on the floor, you know, about a foot thick, something like that.

MR. GRAY: One foot thick?

A. Yes, about a foot thick on the floor, of rock.

(By MR. WAYNE.)

Q. Did you notice the shape and the manner in which this slide chute was built?

A. Yes sir.

Q. How was it built?

A. It was built on the top of the fourth floor, on the top of the cap. It is not built between the posts at all on the top—on the top of the cap, like this. It goes down and gives you plenty of room underneath to come underneath this chute here, and the other end is down on the ore chute, on the top of the ore chute.

Q. On the top of the straight ore chute?

A. Yes.

Q. Will you state about what the width of that slide chute was at the top and at the bottom?

A. Well, it looks to me like it was the same.

Q. It looked to you as though it was the same?

A. Yes. It had two twelve inch planks in the bottom, and it looked to me like it was that way all the way through, nine feet long.

Q. How did you take your steel up after you got it on the sill floor?

A. I wind it up there with that hand machine.

Q. With that windlass?

A. Yes.

Q. How long have you mined?

A. Since 1901.

Q. Always in the Coeur d'Alene?

A. Well, I have been out once in a while and back again.

MR. WAYNE: That is all.

CROSS EXAMINATION.

(By MR. GRAY.)

Q. You say that slide chute was the same width at the bottom as it was at the top?

A. Yes sir, it looks to me that night that way. I didn't make no remarks at all of it.

Q. When did you say you went to work for the Hunter? How long have you worked for the Hunter?

A. About between seventeen and eighteen months.

Q. Continuously, right straight along?

A. No sir.

Q. When did you go to work for them the last time?

A. On the 17th of this last month.

Q. On the 17th of May?

A. Yes.

Q. How long had you been out of their employ?

A. I have been there about eighteen months, I say.

Q. I say, how long had you been out of their employ before you went to work on the 17th of May?

A. I was out, about two weeks, and went back again.

Q. How did you happen to quit two weeks before?

A. I got fired.

Q. And they took you back on the 17th of May?

A. Yes sir.

Q. When you went away from your work that night, which way did you go down?

A. I went down to this west man-way.

Q. Isn't it true that you followed right down with Holmi, down this east way, the same way you had come up first?

A. I just went—

Q. Just answer the question. Didn't you do that, go down the plank?

A. No sir.

Q. When you quit work?

A. No sir, I did not.

Q. Did you have a conversation with Mr. John-

son about a little over ten days ago in Mullan, at the Windsor Hotel corner, at which you and he were present, before you went back to work for the Hunter?

A. Yes sir.

Q. In which you told him in substance that when you went to work that night you had to go up this same plank, the east man-way, and that you couldn't get by the slide chute?

A. No sir, no sir.

Q. You didn't have any such conversation?

A. No sir. A very short word was all.

Q. Where was it that this muck was a foot deep that you spoke of?

A. Down on the third floor.

Q. Around the ore chute?

A. Between the slide and the wall.

MR. GRAY: All right. That is all.

RE-DIRECT EXAMINATION.

(By MR. WAYNE.)

Q. Mr. Ashland, you did, however, go up and take your drill up over this plank when you first went to work?

A. Yes sir.

Q. Will you state whether or not you ever passed over that plank again.

A. I never come back any more, I never pass over that, because I thought there was a man-way there, and I find out there was no more ladders then, only two.

Q. How far did you have to walk on the third

floor from the foot of that east ladder to the ladder in the west man-way?

A. From this here, you mean?

Q. Yes, from that?

A. How far did I have to walk to climb up this ladder?

Q. No. How far is it from this east ladder to the west ladder?

A. Oh, about forty-five feet, around there.

MR. WAYNE: That is all.

MR. GRAY: That is all.

MR. WAYNE: The defendant rests.

EDWARD JOHNSON, a witness on behalf of plaintiff, upon being recalled, testified as follows:

DIRECT EXAMINATION.

(By MR. GRAY.)

Q. Mr. Johnson, had you told Holmi about going by way of the plank?

A. No.

MR. WAYNE: I object to that, if Your Honor please, as an effort to impeach his own witness.

THE COURT: Overruled.

(By MR. GRAY.)

Q. Just tell the jury whether Mr. Shaw, the shift boss, was up in the stope the night of the accident, before you were injured.

A. No, he wasn't up that night there. The night before he was up there, but not that night.

Q. Mr. Johnson, was there a grizzly here at the bottom of that slide chute.

A. No.

MR. AILSHIE: I object to that as leading and suggestive.

THE COURT: Overruled.

(By MR. GRAY.)

Q. Did you have a conversation with Mr. Ashland some time ago, a little over ten days ago, at the corner of the Windsor Hotel, at Mullen, at which you and he were present, and in which he told you that the night after the accident he had to go around by the east man-way and up this plank, and that he couldn't get by the slide chute?

A. Yes, I had. He said he couldn't get by that slide chute, that he took the machine the same way, and went the same way I did, and he pretty near fell there too, pretty close to fall.

MR. GRAY: That is all.

MR. WAYNE: That is all.

JOHN HOLMI, a witness on behalf of plaintiff, upon being recalled testified as follows:

DIRECT EXAMINATION.

(By MR. GRAY.)

Q. Mr. Holmi, the night of the accident, before Mr. Johnson was hurt, did you see Mr. Shaw, the shift boss, up in that stope, up where you were working?

A. Before?

Q. Before he was hurt?

A. No.

Q. Do you know what a grizzly is? Do you know what a grizzly is?

A. No, I don't.

Q. Well, at the bottom of this slide chute and over any part of the ore chute—

A. Oh, I know now.

Q. A little round—was there any grizzly over that ore chute there?

A. No.

Q. The night of the accident?

A. No.

Q. You know what a grizzly is now, do you?

A. Yes, I know.

MR. GRAY: You may inquire.

CROSS EXAMINATION.

(By MR. WAYNE.)

Q. Mr. Holmi, it was the custom of the shift boss to work the two chutes downward each night, was it not, to go to each chute?

A. Each stope?

Q. Yes, each stope?

A. I think so.

Q. Well, do you know that Mr. Shaw was not in this stope the night that Johnson was hurt, before he was hurt?

A. Yes, because I remember that Johnson told me about—

Q. Johnson what?

A. Johnson told me about the machine.

Q. Never mind about Johnson.

MR. WAYNE: I object if Your Honor please, to what Johnson told him.

(By MR. WAYNE.)

Q. You say you didn't see Shaw there?

A. Not before Johnson got hurt.

Q. He might have been there and you have not seen him, might he not?

A. Yes, if he was on the first floor, I didn't see.

Q. How about if he was on the third floor?

MR. GRAY: I don't think that is material, Your Honor.

A. He could be in this west end, this west end of the stope, right here.

(By MR. WAYNE.)

Q. He could be in the west end of the stope on the third floor and you not see him?

A. Yes.

Q. Is that what you mean?

A. If he put his light off and come pretty easy, pretty slow, I think may be.

Q. He could have been in the east or central portion of the third floor and you not see him from the fourth floor, couldn't he?

A. No, not on the third floor.

Q. Why not?

A. Couldn't get in dark on the lagging on the east end, fall down, and we saw the light when he was coming here, if he come here.

Q. If he came up the west man-way he could be any place on the third floor and you couldn't see him from the fourth, couldn't he?

A. He couldn't come by this—I was mucking on top.

MR. WAYNE: If you will just repeat the question. I think I will insist upon an answer to that question.

(Last question read.)

(By MR. WAYNE.)

Q. The fourth floor there was lagging in between these different sets, was there not?

A. Yes.

Q. And there was a pile of muck on top of the lagging, was there not?

A. Yes.

Q. Could you see his light through the pile of muck and the lagging?

A. I saw light in the man-way when I was working here.

MR. WAYNE: That is all.

MR. GRAY: That is all, Mr. Holmi. We rest.

MR. AILSHIE: That is all.

THE COURT: Gentlemen of the jury, you may be excused for a few minutes. Remain in the hallway, however. Perhaps you had just better go into the jury room and sit there for a little bit.

(Jury retires from the court room.)

MR. AILSHIE: Now at this time, the defendant moves the court to instruct the jury to return a verdict in favor of the defendant, upon the grounds that the plaintiff has failed to make a case sufficient to go to the jury or to support a verdict in favor of the plaintiff, and that they have particularly failed for the following reasons:

1. That it appears by the evidence of the plaintiff himself, as well as by the evidence upon the whole, that the injury inflicted was such as resulted from an assumed risk.

2. That it is shown that the plaintiff was guilty of gross negligence.

3. That it does not appear anywhere in the evidence that the defendant has been guilty of any act of negligence.

4. That if the place where the plaintiff was injured was in any way dangerous, or any more unsafe than any other way he could have gone or passed over, that it was placed there, and the result of the act of a fellow servant.

That it further appears that his injury resulted from the negligence of the plaintiff in choosing between ways of going or two modes or courses of conduct, and that they were not influenced by the defendant.

(Argument by counsel and remarks by Court.)

THE COURT: I think that perhaps while the case is without any precise precedent, I shall have to take the view that it is one for the jury. Therefore the motion will be denied.

MR. WAYNE: Does the order of the court cover this motion and give us an exception to it, or should we prepare that in writing?

THE COURT: You have your exception. The motion is sufficient, and you may have your exception.

(Jury returns into court room.)

THE COURT: If you have any requests, I would like to have them before the argument opens, gentlemen.

Adjourned until 7:30.

THE COURT: Gentlemen, as you have been advised the plaintiff has brought this action upon the theory that while he was in the employ of the defendant he was injured through the defendant's negligence in not providing him a safe place in which to work. It is conceded that he was so employed, and that while in the performance of his duties he fell and was injured, and has suffered some damage. The question for you to decide are as to whether or not the defendant company was at fault, and whether or not the plaintiff himself was free from fault, and if you answer both of these questions in the affirmative, what is a reasonable amount to award to the plaintiff for his injuries.

The case has been calmly tried, and argued to you in a commendably way. While counsel differ as to the conclusions, they have discussed the facts, and doubtless are able to assist you to some extent in getting at the truth. Some of you were upon the jury that tried the last case, and you heard the instructions that were given then. The principles of law are in a great many respects the same in this case as they were in that. But in some respects there are different features, and some of you were not upon that jury, and hence I shall instruct you fully in this case, and those of you who were in the other case will lay aside any recollection that you may have of what was said in that case.

As I assume all of you understand, at least I so inferred from your answers when you were being qualified as jurors, it is not in every case where a man is

injured that he is entitled to recover damages from his employer. It is only in cases where the employer has violated some duty he owes to his employee that he becomes responsible for an accident which may occur. The violation of that duty is what we ordinarily call negligence, and what counsel have referred to as negligence in the trial of this case. And the facts question for you to consider is whether or not the defendant was negligent, for if you answer that question in the negative that is the end of the case. The plaintiff cannot recover unless the defendant was negligent, and unless such negligence contributed to or caused the accident. Now, counsel have not differed as to what is meant by the term negligence. It is generally understood to be the doing of something which a prudent person would not under the circumstances do, or the leaving undone of something which a person of like prudence would have done under the circumstances. You will see that there is no hard and fast or definite rule or measure; it is a principle and a general rule, and when it comes to the application of the rule to the facts in the case we must leave that to the good sense and experience of men such as you are, who have had some knowledge of the practical affairs of like, and have some ideas of how men ordinarily and usually act, that is, men of prudence, and men who have a proper or due regard for the rights and safety of others. So that the first question here is, did the defendant act with reasonable prudence in providing a way by which the plaintiff could go to and come from his place of work

in its mine. And, as I have already indicated to you, it must appear that its failure to provide such a way or to use due care in providing such a way, if it was negligent in that respect, contributed to the injury. Upon this issue, that is, the question whether or not the defendant was negligent, the burden of proof is upon the plaintiff. He, the plaintiff, must show you, that is, convince you, by a preponderance of the evidence, that the defendant was negligent substantially in the manner pointed out in his pleading, the amended complaint. Now, if you find in his favor upon that issue, there are still some other questions upon which you must pass before you could find in his favor upon the suit as a whole. It is a general rule, and I should say to you that it is a rule adopted by the express statute of this state, and hence is binding upon all of us, if we are law abiding citizens, it is a general rule that even though the defendant is negligent, and that negligence contributes to an injury, if, at the same time, the plaintiff himself, the employe, is guilty of negligence also contributing to the injury, then he, the plaintiff, the employe, cannot recover from his employer. That is what is ordinarily referred to as contributory negligence. In some quarters it is thought to be a harsh doctrine. But, as I have said to you, whatever may be your pre-conceived ideas upon that point, it is a rule of law in this state, and, as law abiding men, we should enforce it until, through the legislative department of the government, a different rule is established. Now, contributory negligence is just like other negligence,

that is, it is the doing of something which an ordinarily prudent employe would not do. It is taking a chance that an ordinarily prudent employe would not take, or it is the leaving of something undone by him which an ordinarily prudent employe would do. You will see that negligence is the same whether it be of the employer or of the employe. One is called the primary negligence, that of the employer, and the other contributory negligence, that of the employe. Now, as to this issue, the burden of proof is not upon the plaintiff, but is upon the defendant; that is to say, before you can find that the plaintiff is debarred from recovering by reason of his own negligence, it must appear by a preponderance of the evidence that he was so negligent. However, if it appears to your satisfaction from the evidence as a whole, then it is unimportant from what source the proof of evidence may have come, and as I have already intimated to you, if you find that the plaintiff himself was guilty of negligence in the premises, and that his negligence contributed to his injury, then he cannot recover.

And still a third issue, and as to this I invite your particular attention, because it has entered into one phase of the argument of the case to a very large extent. Even though you should find that the defendant was negligent, even though you should find that the plaintiff was not negligent, he might still be debarred from recovering under the rule commonly referred to as the assumption of risk by an employe. I will explain that to you in this way. If one, being

in the employ of another, uses a tool or a piece of machinery which is defective, or works in a place which is dangerous, and he, the employe, knows of the defect or the dangerous condition, and, by reason of his age and intelligence and experience, is able to appreciate the peril of using such defective device or machine, or the peril from such dangerous conditions, in the place where he works, then the general rule is that he impliedly agrees to take the chance, he relieves his employer from that chance. I explained that to you upon the other jury by the use of a very familiar and simple device, and perhaps it is as good an illustration as I can give you now. If one of you, being a farmer, employs a farm hand, and, we will say, puts into his hands an axe or a pitchfork with a cracked handle, and the employe knows nothing about it, and uses the device ignorant of the weakness of the handle, and is injured as a consequence, then the employer is held responsible for his negligence in not furnishing him with a reasonably safe device; but if, upon placing such axe or pitchfork in the hands of his employe, he calls his attention to it, and the employe is able to appreciate, as is the employer, the danger of using a pitchfork or axe in that condition, then if he goes on and uses it, he can make no complaint if he suffers injury, because he impliedly agrees to take the chance. You will see that the rule is in accord with reason. Now, if in this case, under that principle, the plaintiff knew of the dangerous condition complained of, and went ahead and worked therein, and used a danger-

ous passageway, he could not under the general principle, recover, that is, he would be debarred, he would under the law be taking the chance. There is one exception to that rule of assumed risk, and it is the one referred to during the course of the argument, and, that I may state that exception a little more precisely, I read to you what I have jotted down here as a definition of the exception. For a certain time the employer may remain liable for failure to use reasonable care in furnishing a safe place in which to work, notwithstanding the workman's appreciation of the danger, if it, the employer, induces the workman to keep on, by a promise that the course of the trouble will be removed. To be more specific, and to apply the principle thus stated in general language to the issues in this case, suppose that you are convinced, first, that at the time of the accident and for a few days prior thereto the defendant had provided no reasonably safe way for the plaintiff and others to use in going to and coming from their place of work, I say, suppose that you find such to be the situation, and, second, suppose that the plaintiff was aware of this condition, and, by reason of his age, intelligence and experience as a miner, he was able to appreciate the perils, then the general principle or rule is that by continuing to use the dangerous way, or one of the dangerous ways so appreciated, he assumed the risk of injury; that is, by continuing in the employment, he, in effect, said to the defendant that he would not hold it responsible for any accident which might occur from such use. But—and here is the ex-

ception heretofore stated in general language,—if, under such circumstances, the plaintiff, that is, Mr. Johnson, called the dangerous condition to the attention of the defendant's representative, its shift boss, and the defendant, through the shift boss, thereupon promised to remedy the defect or to provide a safe way, and, in reliance upon such promise, the plaintiff continued to work, and therefore necessarily used a way of getting to his work or coming from it which involved a measure of peril for a time, not of unreasonable duration, and consequently suffered injury on account of such unsafe way, then he is not necessarily debarred from recovering by the general rule of assumption of risk; that is, if there was a promise to provide a safe way, it is for you to say whether under all the circumstances and in view of such promise the plaintiff was wanting in reasonable care in continuing in the employment of the defendant, and, in the course thereof, using the way which he did use in getting to and from his work, if not, the plaintiff is not debarred from recovering, and the defendant is not relieved from the result of its failure to provide a reasonably safe way, by the contributory negligence of the plaintiff. I say, if you find that under all of those circumstances, and in view of the promise, if you find a promise was made, the plaintiff was not negligent in continuing to work, and in choosing the way that he did choose, then he would not be debarred by his contributory negligence.

In this connection it is proper that I direct your attention to the fact that there is evidence tending to

show that there was another way of reaching the place and coming from the place where the plaintiff was at work. There is a conflict of evidence upon that point, but there is evidence tending to show that there was such a way, and evidence to rebut it. The defendant contends that this other way was a safe one, that is, the way going by the rock chute or slide. If you find that it was a reasonably safe way, and that plaintiff knew of its existence, and, instead, of using it, for his own convenience he carelessly used the more dangerous way, then he could not recover, for, as you will see, his injuries would upon that assumption be the result of his own carelessness in taking a dangerous way, when one reasonably safe was open for his use.

If you find that the defendant was negligent, and knew the negligence contributed to the plaintiff's injury, and that he was not guilty of contributory negligence, and that he did not assume the risk, as I have explained that to you, together with the exception to the general rule, then you should find in his favor. Your attention has been called to the fact that it is admitted that he was injured, and that his injuries are of a more or less serious and permanent character. The amount of the damages, if you find for the plaintiff, is left to your sense of fairness, discretion and good, common sense. There is no definite measure, there is no fixed standard by which these damages can be measured. You will take into consideration the nature of the injury, and the degree of permanency, the pain and humiliation already

suffered, and which will be suffered, the loss of time, and the measure of disability in the future, that is, the disability to work, and all other facts and circumstances in evidence, and reach a conclusion such as you think will be a fair compensation to him for his loss.

Gentlemen, there is some conflict of testimony and it is for you to reconcile those conflicts so far as may be. I am leaving to you entirely the issues of fact. I am leaving to you entirely the credibility of the witnesses, and the weight to be given to the testimony of any of them. It is for you to say upon which side the truth lies, and it is for you to determine the issues of fact. I cannot relieve you from that responsibility, and I have no disposition to try to influence you one way or the other in finding upon these facts. And, as I am leaving to you fully the determination of the issues of fact, I assume that you will in good faith undertake to apply to the facts fairly the instructions which I have given you, in their spirit and effect.

It is necessary that all of you concur in finding a verdict. It takes all twelve of you in this court. Two forms of verdict have been prepared, one for your use in case you find for the plaintiff, and one for your use in case you find for the defendant. You will have no difficulty in making use of them, and in filling in the blank, if you find in favor of the plaintiff, and your foreman will sign the verdict which expresses your conclusion.

MR. AILSHIE: At this time, in the presence of the jury, and before they retire, defendant excepts to the refusal of the Court to give its requested instructions No. 1, No. 2 and No. 3.

At this time the defendant excepts to that part of the Court's instructions in which the Court referred to the instructions in which he defined the assumption of risk, and the illustration given there of the use of an axe and pitchfork, on the ground that it does not properly define the law of assumption of risk, and is prejudicial to the defendant.

MR. WAYNE: One other exception, if Your Honor please, to the instruction of the Court advising the jury that they must first find whether the defendant was negligent, and, if so, whether the negligence of the defendant was the proximate cause of the injury, or contributed to the injury, our exception being to that portion of the instruction to the effect that they might find for the plaintiff if the negligence of the defendant contributed with his own negligence to his injury.

THE COURT: I didn't intend so to instruct. I thought that when I came to contributory negligence that I expressly instructed them that even though the defendant was negligent, and that negligence contributed to the injury, still, if he was negligent, and his negligence contributed to the injury, he could not recover. Did I not so instruct?

MR. GRAY: Yes.

MR. WAYNE: I think the instruction I refer

to was on the question of the negligence of the defendant itself. It was in the early part.

THE COURT: I think perhaps I have made that clear. I think I understand that point.

MR. WAYNE: Of course, if I am mistaken as to what the instruction shows, the exception would fall anyhow.

THE COURT: Yes.

MR. AILSHIE: I want to take one; it simply relates back to our motion for an instructed verdict, but I want to except to that portion of the Court's instruction in which he defined the exception to the rule of the assumption of risk. The defendant excepts to that part for the reason that the exception to the rule is not applicable to the facts in this case, and that it was error and prejudicial to the defendant to instruct the jury with reference to the exception to that rule.

THE COURT: Yes.

THE COURT: I will not recall the jury: I think the instructions I gave convey my views of the law.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON,

Plaintiff,

vs.

THE GOLD HUNTER MINING & SMELTING
COMPANY, *Defendant.*

VERDICT.

We, the jury in the above entitled action, find for the plaintiff and assess the damages at the sum of \$10,000.

(Signed.)

C. D. WARNER,
Foreman.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON, Plaintiff,
vs.

GOLD HUNTER MINING & SMELTING COMPANY, Defendant.

I, Frank S. Dietrich, Judge of the District Court of the United States for the District of Idaho, Northern Division, as the Judge who presided in said court at the trial of the case of Edward Johnson vs. Gold Hunter Mining & Smelting Company, tried in said court on the 1st day of June, A. D. 1915, and ending on said day, do hereby certify that the foregoing Bill of Exceptions was handed me by the Clerk of the Court on the 14th day of August, A. D. 1915, for settlement and it appearing to me that the same has been within the time allowed by law, and within the time allowed by an order of this court extending such time, served upon the attorneys for the plaintiff, together with notice that the same would be presented for settlement, and the attorneys for the plaintiff having made no objection to the settlement, and having offered no amendments thereto, and it appearing to me that the said Bill of Exceptions is correct

and contains in substance all of the evidence offered at the trial of said cause, excluding exhibits which are separately certified and the instructions given by the court herewith and all the exceptions taken by the defendant to the admission of testimony and to the giving and refusal to give instructions to the jury, the said Bill of Exceptions is hereby signed, sealed, settled and allowed as and for a full, true and correct Bill of Exceptions in this cause, and I hereby certify that the same with the exhibits separately certified be made a part hereof contains all of the evidence produced at the trial. The Clerk is hereby directed to certify to the said exhibits as being a part of this Bill of Exceptions.

Dated at Boise, Idaho, this 14th day of August,
A. D. 1915.

FRANK S. DIETRICH,
Judge.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON, Plaintiff,

vs.

GOLD HUNTER MINING & SMELTING COMPANY, Defendant.

NOTICE.

To Edward Johnson, plaintiff, and to Messrs. John P. Gray and Walter H. Hanson, attorneys for plaintiff:

You and each of you will please take notice that the foregoing bill of exceptions, complete in 147

pages, will be presented to the Honorable Frank S. Dietrich, Judge of the District Court of the United States for the District of Idaho, Northern Division, for settlement as a full, true and correct bill of exceptions in this case.

JAMES A. WAYNE,
J. F. AILSHIE,
Attorneys for Defendant.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON, Plaintiff,
vs.
GOLD HUNTER MINING & SMELTING COMPANY, Defendant.

Service of the defendant's proposed Bill of Exceptions in the above entitled action is hereby accepted and the receipt of a true and correct copy thereof admitted at Coeur d'Alene, Idaho, this 28th day of July, A. D. 1915.

JOHN P. GRAY,
Residence and Postoffice Address,
Coeur d'Alene, Idaho;
WALTER H. HANSON,
Residence and Postoffice Address,
Wallace, Idaho;
Attorneys for Plaintiff.

Endorsed: Filed August 14, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON, Plaintiff,
vs.

GOLD HUNTER MINING & SMELTING COMPANY, Defendant.

STIPULATION.

It is hereby stipulated and agreed between the parties to the above entitled action, acting through their respective counsel, that the defendant herein, Gold Hunter Mining & Smelting Company, may have thirty (30) days extension of time from and after the 30th day of June, A. D. 1915, within which to obtain a writ or error in the above entitled cause and within which to file a bond superseding the judgment in said cause; and that said defendant may have a stay of proceedings and a stay of execution during said time.

Dated this 23rd day of June, A. D. 1915.

JOHN P. GRAY,
WALTER H. HANSON,
Attorneys for Plaintiff.
JAMES A. WAYNE,
J. F. AILSHIE,
Attorneys for Defendant.

Approved: Dietrich, Judge. June 28, 1915.

Endorsed: Filed June 28, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON, Plaintiff,
vs.

GOLD HUNTER MINING & SMELTING COMPANY, Defendant.

PETITION FOR WRIT OF ERROR.

Comes now Gold Hunter Mining & Smelting Company, a corporation, defendant herein, and says that on or about the 1st day of June, 1915, this court entered judgment herein in favor of the plaintiff and against the defendant, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, This defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

J. F. AILSHIE,
Residence and Postoffice Address,
Coeur d'Alene, Idaho;

JAMES A. WAYNE,
Residence and Postoffice Address,
Wallace, Idaho;

Attorneys for Defendant.

Endorsed: Filed July 30, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON, Plaintiff,
vs.

GOLD HUNTER MINING & SMELTING COMPANY, Defendant.

ASSIGNMENTS OF ERROR.

I.

The court erred in denying defendant's motion for a directed verdict and in refusing to instruct the jury to return a verdict in favor of the defendant at the close of the evidence, for the following reasons, to-wit:

(a) Because it appeared from all the evidence adduced in this case that there was no actionable negligence on the part of the defendant which was the proximate cause of the injury complained of in plaintiff's complaint, and in this case.

(b) Because it appeared by the evidence that said plaintiff knew and appreciated the risk to which he was subjected at the time of his injury, and that plaintiff therefore assumed such risks, and that his injury resulted from an assumed risk.

(c) Because it appeared by the evidence that the plaintiff at the time of his injury was guilty of contributory negligence in passing along a way which he knew to be defective and dangerous, and that plaintiff's injury resulted from his own contributory negligence.

(d) Because it appeared from the evidence that if the place where the plaintiff was injured was un-

safe, that such place had been rendered unsafe by the act of a fellow servant.

(e) Because it appeared from plaintiff's complaint and the evidence abduced in this case that the only act of negligence charged against this defendant was the failure to repair a ladder between the second and third floors, and that such failure on the part of the defendant was not the proximate cause of the plaintiff's injury.

(f) Because it appears that the plaintiff was injured while passing along an unsafe way which he had adopted, uninfluenced by any act of the defendant rather than to pass along a safe way which had been provided by the defendant, and was therefore guilty of contributory negligence at the time of his injury.

II.

The court erred in refusing to instruct the jury as requested by defendant's instruction numbered 1, which was as follows, to-wit:

"I instruct you that where a person injured seeks to recover on the ground that the employer has promised to repair, he must show that in doing what he did or subjecting himself to the danger that he could not foresee or anticipate the injury and that there was no other reasonable or equally safe way of going than the way he went. And if you should believe in this case that there was another way provided, which was the method usually provided in such mines for employees

going from one floor to the other, and that the plaintiff could have gone that way on the night he was injured, then I instruct you that he would not have been justified in taking a more dangerous way if it was not the usual way provided by the employer and that any promise of providing another way would not furnish him a justification for subjecting himself to an additional danger."

III.

The court erred in refusing to instruct the jury as requested by defendant's instruction numbered 2, which was as follows, to-wit:

"An employee who knows and appreciates the hazard of his service and the risk which is apparent to ordinary observation assumes the risk incident to the same, and where the defect is as obvious and well known to the employee as to the employer, the employee assumes the risk thereof as one of the ordinary risks of business or employment. If, in the case now before you, you believe that the defect or danger was one of which the plaintiff knew and appreciated, as well as the employer, then it was such a risk as an employee assumes."

IV.

The court erred in giving the following portion of his oral instructions to the jury, to-wit:

Some of you were upon the jury that tried the last case, and you heard the instructions that

were given then. The principles of law are in a great many respects the same in this case as they were in that. But in some respects there are different features, and some of you were not upon that jury, and hence I shall instruct you fully in this case, and those of you who were in the other case will lay aside any recollection that you may have of what was said in that case."

To which portion of the said oral charge of the court to the jury, and specifically that portion wherein the court referred to the instructions previously given to another jury, defining negligence and announcing the law with reference to negligence, the defendant by counsel then and there duly objected and excepted for the reason that it was prejudicial to the defendant to have the jury in this case reminded of the case which they had just previously tried, and in which they had just previously rendered a verdict; and the action of the Court in giving the said portion of said instruction is now by this defendant assigned as error.

V.

The court erred in giving the following portion of his oral instruction to the jury, to-wit:

"Even though you should find that the defendant was negligent, even though you should find that the plaintiff was not negligent, he might still be debarred from recovering under the rule commonly referred to as the assumption of risk by an employee. I will explain that to you in this way. If one, being in the employ of another,

uses a tool or a piece of machinery which is defective, or works in a place which is dangerous, and he, the employee, knows of the defect or the dangerous condition, and, by reason of his age and intelligence and experience, is able to appreciate the peril of using such defective device or machine, or the peril from such dangerous conditions, in the place where he works, then the general rule is that he impliedly agrees to take the chance, he relieves his employer from that chance. I explained that to you upon the other jury by the use of a very familiar and simple device, and perhaps it is as good an illustration as I can give you now. If one of you, being a farmer, employs a farm hand, and, we will say, puts into his hands an axe or a pitchfork with a cracked handle, and the employee knows nothing about it, and uses the device, ignorant of the weakness of the handle, and is injured as a consequence, then the employer is held responsible for his negligence in not furnishing him with a reasonably safe device; but if, upon placing such axe or pitchfork in the hands of his employee, he calls his attention to it, and the employee is able to appreciate, as is the employer, the danger of using a pitchfork or axe in that condition, then if he goes on and uses it, he can make no complaint if he suffers injury, because he impliedly agrees to take the chance."

To which portion of said oral instructions to the jury, and particularly to that portion of said in-

struction which in effect advised the jury that it was necessary for the employer to call the attention of an employee to the defective condition of an instrument or instrumentality in order to advise the servant of a danger which was patent and obvious, and which advised the jury in effect that the employee did not assume the risk of working with such instrument or instrumentality until he had been so instructed. The defendant by counsel then and there duly objected and excepted for the reason that it was not sufficient that the negligence of the defendant should have contributed to plaintiff's injury, it being necessary that defendant's negligence must have been the proximate cause of plaintiff's injury, which said exception was duly allowed by the court; and which said action of the court in giving the said portion of the said instruction the defendant now assigns as error.

VI.

The court erred in giving the following portion of his oral instruction to the jury, to-wit:

“The plaintiff cannot recover unless the defendant was negligent, and unless such negligence contributed to or caused the accident.”

To which portion of the said oral charge to the jury, and specifically that portion wherein the court advised the jury in effect that the plaintiff could recover if the defendant was negligent and such negligence contributed to the plaintiff's injury, the defendant by counsel then and there duly objected and accepted for the reason that it was not sufficient that

the negligence of the defendant should have contributed to plaintiff's injury, it being necessary that defendant's negligence must have been the proximate cause of plaintiff's injury; which said exception was duly allowed by the court and which said action of the court in giving the said portion of the said instruction the defendant now assigns as error.

SPECIFICATIONS WHEREIN THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE VER- DICT OF THE JURY AND JUDGMENT THEREON.

The evidence is insufficient to sustain the verdict of the jury and the judgment thereon in the following particulars, and for the following reasons, to-wit:

- (a) There is no evidence of any negligence on the part of the defendant which was the proximate cause of the injury to the plaintiff. While the evidence does disclose the fact that a short time prior to plaintiff's accident one of the ladders leading from the third to the second floor of the stope where plaintiff was working had been broken, it does not appear that this condition was known to the defendant, or could have been known by a reasonable inspection, nor does it appear from the evidence that the defective condition of this ladder was the proximate cause of plaintiff's injury, and it does appear from the evidence that there was another safe way known to the plaintiff by which he could safely descend from the third floor to the second floor, and the evidence further discloses that the proximate

cause of plaintiff's injury was the fact that he selected a way of descending from the third to the second floor which he knew or believed to be unsafe and defective, and by which route he was not obliged or required to descend, and which unsafe way had been provided by the act of a fellow servant.

(b) The evidence discloses that the proximate cause of the plaintiff's injury was the negligence of a fellow servant or servants. In this respect the evidence shows that the plank or lagging upon which plaintiff was attempting to cross at the time of his injury was used by the plaintiff and other employees after the ladder between the second and third floors had been broken; the chief witness for the plaintiff (John Holmi) testified that he was first told of the existence of this plank or lagging by either the plaintiff or another of his fellow workmen. In the absence of any proof that this way had been provided by the defendant as a means of going from the third to the second floor, or vice versa, it must be assumed that it was simply a means provided and adopted by the employees themselves as an easy mode of travel between these floors.

(c) The evidence discloses that the plaintiff negligently placed himself in an obviously dangerous position, namely, upon the plank or lagging beneath which there were two open floors; the evidence shows that the plaintiff himself knew or believed this to be a dangerous position; and the evidence further shows that plaintiff need not have placed himself in such position but could have descended by another and safer route; the evidence further shows that what-

ever dangers were attendant upon walking over this inclined plank or lagging were open, obvious and as well known, understood and appreciated by the plaintiff as they could possibly have been by the defendant, and that in choosing and electing to go by such obviously dangerous route the plaintiff was guilty of negligence per se and assumed the risk as a matter of law.

(d) And for the same reason and in the same particulars as mentioned in the foregoing specification (c), the plaintiff was guilty of gross contributory negligence in attempting to pass over said plank or lagging.

Comes now the defendant in this action in connection with its petition for a writ of error and makes, proposes and files the foregoing assignments of error which it avers occurred upon the trial of the said cause, together with its specifications wherein the evidence is insufficient to sustain the verdict or judgment thereon and prays that because thereof, the judgment of the District Court may be reversed.

JAMES A. WAYNE,
J. F. AILSHIE,

Attorneys for Defendant.

Service accepted and copy received July 28, 1915.

JOHN P. GRAY,
Coeur d'Alene, Idaho;
WALTER H. HANSON,
Wallace, Idaho;

Attorneys for Plaintiff.

Endorsed: Filed July 30, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON, Plaintiff,
vs.

GOLD HUNTER MINING & SMELTING COMPANY, Defendant.

ORDER ALLOWING WRIT OF ERROR.

On this 14th day of August, 1915, came the defendant by its attorneys, and filed herein and presented to the court its petition praying for the allowance of a writ of error, an assignment of errors intended to be urged by them, praying also that the transcript of the record and proceedings and papers upon which the judgment herein is rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had that may be proper in the premises.

On consideration whereof the court does allow the writ of error upon the defendant giving bond according to law in the sum of \$12,000, which shall operate as a supersedeas bond.

Dated this 14th day of August, A. D. 1915.

FRANK S. DIETRICH,
Judge of the United States District Court, for the
District of Idaho.

Endorsed: Filed Aug. 14, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON, Plaintiff,
vs.

GOLD HUNTER MINING & SMELTING COMPANY, Defendant.

BOND ON WRIT OF ERROR.

Know All Men By These Presents, That we, Gold Hunter Mining & Smelting Company, a corporation, as principal, and The Aetna Accident and Liability Company, a corporation organized and existing under and by virtue of the laws of Connecticut, having complied with all the statutes of the United States authorizing it to become a surety on bonds in the courts of the United States, as surety, are held and firmly bound unto the defendant in error, Edward Johnson, in the full and just sum of Twelve Thousand (\$12,000) Dollars, to be paid to the said defendant in error, Edward Johnson, his certain attorneys, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our successors and assigns jointly and severally, firmly by these presents.

Sealed with our seals and dated this 27th day of July, A. D. 1915.

Whereas, Lately at a session of the District Court of the United States for the District of Idaho, Northern Division, in a suit pending in said court between Edward Johnson, as plaintiff, and Gold Hunter Mining & Smelting Company, a corporation, as defend-

ant, a judgment was rendered against the said Gold Hunter Mining & Smelting Company, upon a verdict of the jury in the sum of Ten Thousand (\$10,000.00) Dollars, and costs amounting to the sum of \$129.15;

And Whereas, The said defendant, Gold Hunter Mining & Smelting Company, considering it is aggrieved thereby, has obtained from the said court a writ of error to reverse and correct said judgment in that behalf, and a citation directed to the said plaintiff, Edward Johnson, citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, in the State of California;

Now, The condition of the above obligation is such, that, if the said Gold Hunter Mining & Smelting Company shall prosecute the said writ of error to effect, and answer all damages and costs if it fails to make the said plea good in said court, then the above obligation to be void, otherwise to remain in full force and virtue.

This bond is intended as a bond for costs on appeal and is a supersedeas bond.

THE AETNA ACCIDENT AND LIABILITY
COMPANY.

By HERMAN J. ROSSI,

(Seal) Resident Vice-President.

Attest: Walter H. Hanson, Resident Assistant Secretary.

The foregoing bond is hereby approved this 14th day of August, A. D. 1915, and the same when filed

shall operate as a bond for costs on appeal and as a supersedeas bond.

FRANK S. DIETRICH, Judge.

Endorsed: Filed August 14, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON, Plaintiff,
VS.

GOLD HUNTER MINING & SMELTING COMPANY, Defendant.

PRAECLYPE FOR TRANSCRIPT.

To Mr. A. L. Richardson,
Clerk of the United States District Court,
Boise, Idaho.

Dear Sir:

You will please prepare transcript in the above entitled cause and please include therein:

1. Writ of Error and Citation, Appeal Bond, Assignments of Error and all other papers relating to this appeal.

2. Judgment Roll.

3. Bill of Exceptions.

4. Copy of Journal Entries.

And in the Judgment Roll you will please include:

1. Complaint.

2. Demurrer to Complaint.

3. Amended Complaint.

4. Answer.

5. Amendment to Answer.
6. Verdict.
7. Judgment.

J. F. AILSHIE,
Residence and Postoffice Address,
Coeur d'Alene, Idaho;
JAMES A. WAYNE,
Residence and Postoffice Address,
Wallace, Idaho;
Attorneys for Defendant.

Endorsed: Filed July 30. 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*The United States Circuit Court of Appeals for the
Ninth Circuit.*

EDWARD JOHNSON, Plaintiff,
vs.
GOLD HUNTER MINING & SMELTING COMPANY, Defendant.

WRIT OF ERROR.

The United States of America,
Ninth Judicial District Circuit,—ss.

*The President of the United States, to the Honorable
Judge of the District Court of the United States,
for the District of Idaho, Greeting:*

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, or some of you, between Edward Johnson, plaintiff, and Gold Hunter Mining & Smelting Company, a corporation, de-

fendant, a manifest error hath happened, to the great damage of the said Gold Hunter Mining & Smelting Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said Circuit on the 4th day of October next, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 2nd day of Sept., A. D. 1915, and in the (139) one hundred and thirty-ninth year of the Independence of the United States of America.

Allowed by: FRANK S. DIETRICH,

(Seal) United States District Judge.

Attest: A. L. Richardson, Clerk of the District Court of the United States, District of Idaho. By Pearl E. Zanger, Deputy.

Endorsed: Filed Sept. 2, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*The United States Circuit Court of Appeals for the
Ninth Circuit.*

EDWARD JOHNSON, Plaintiff,

vs.

GOLD HUNTER MINING & SMELTING COMPANY, Defendant.

CITATION ON WRIT OF ERROR.

The United States of America,
Ninth Judicial Circuit,—ss.*To Edward Johnson, Greeting:*

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, California, in said Circuit, on the 4th day of October next, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Idaho, Northern Division, wherein Gold Hunter Mining & Smelting Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the said judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable FRANK S. DIETRICH, District Judge of the United States District Court at Boise, Idaho, within said Circuit, this 2nd day of Sept., in the year of our Lord one thousand nine hundred and fifteen, and of the Independence of the

United States of America the one hundred and thirty-ninth.

FRANK S. DIETRICH,
United States District Judge.

We hereby, this 18th day of August, 1915, accept personal service of this citation on behalf of Edward Johnson, Appellee.

JOHN P. GRAY,
WALTER H. HANSON,
Attorneys for Appellee.

Endorsed: Filed Sept. 2, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

RETURN TO WRIT OF ERROR.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things therunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

Attest: A. L. RICHARDSON, Clerk.
 By PEARL E. ZANGER, Deputy.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON,
Plaintiff, and Defendant in Error,
vs.
GOLD HUNTER MINING & SMELTING COMPANY,
Defendant, and Plaintiff in Error.

CLERK'S CERTIFICATE.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 212, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same, together constitute the transcript of the record herein upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of \$359.50, and that the same has been paid by the plaintiff in error.

Witness my hand and the seal of said court this 2nd day of October, 1915.

A. L. RICHARDSON, Clerk.

By PEARL E. ZANGER, Deputy Clerk.

United States
Circuit Court of Appeals
 For the Ninth Circuit

GOLD HUNTER MINING & SMELTING COMPANY,	Plaintiff in Error.
vs.	
EDWARD JOHNSON,	Defendant in Error.

At Law

Brief of Plaintiff in Error

Upon Writ of Error from the United States District Court
 for the District of Idaho,

Filed

JAMES A. WAYNE,
 Wallace, Idaho.

FEB 2 - 1916

J. F. AILSHIE,
 Coeur d'Alene, Idaho.

F. D. Morgan

Attorneys for Plaintiff in Error.

WALTER H. HANSON,
 Wallace, Idaho,

JOHN P. GRAY,
 Coeur d'Alene, Idaho.

Attorneys for Defendant in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit

GOLD HUNTER MINING & SMELTING
COMPANY, Plaintiff in Error.
 vs. }
EDWARD JOHNSON, Defendant in Error. At Law

STATEMENT OF THE CASE.

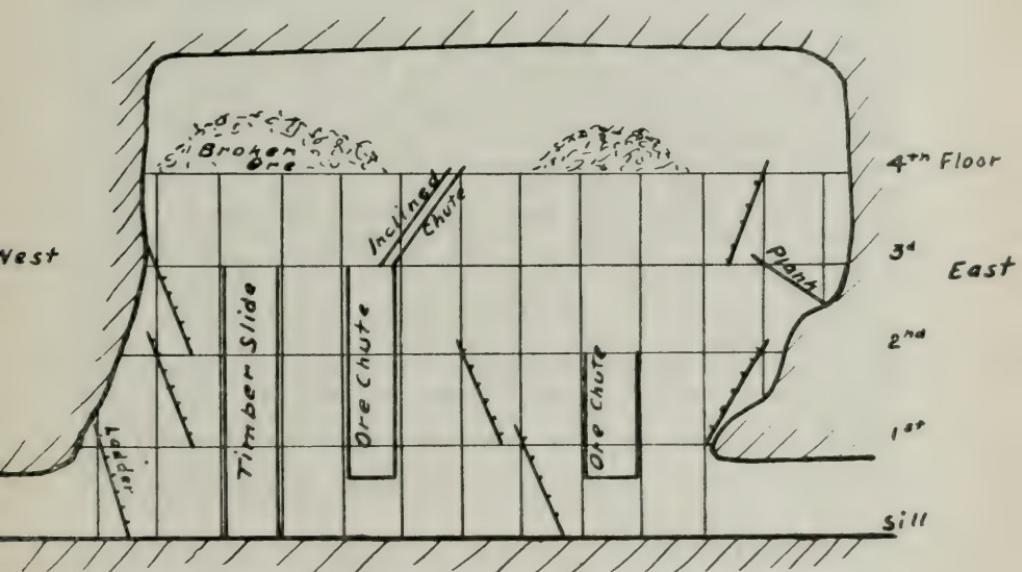
The defendant in error (hereafter called the plaintiff) brought this action against plaintiff in error (hereafter called the defendant) to recover damages for personal injuries suffered while an employee in the defendant's mine near Mullan in Shoshone County, Idaho. Judgment was recovered for the sum of \$10,000 and defendant brings the case to this court on writ of error.

The plaintiff alleged in his amended complaint that on the night of October 17, 1914, he was working for the defendant in the Gold Hunter Mine as a machine man; that he was on that night sent to work on the fourth floor of the west stope of the 400 foot level of the mine, and that about two hours after he went to work his machine

drill began to leak air, and that thereupon he took down the drill intending to carry the same to the 400 foot level and thence to the main station in the mine on a higher level and exchange it for another drill; that in going from the fourth floor of the 400 foot level he proceeded to a man way near the east end of the stope, carrying his drill with him, went down the ladder in the east man way from the fourth floor to the third floor, then attempted to pass over a plank or lagging which was laid from the cap on the third floor to a bench or ledge of rock at the face of the stope, and, while walking upon this plank and carrying his drill, he either slipped or the plank to move slightly, causing the plaintiff to fall from the plank downward a distance of some 20 feet with the machine drill on top of him, and causing severe injuries. The plaintiff in his complaint alleged that there was another manway near the west end of this stope, but attempted to explain the reason for his not using this west manway by alleging that having descended from the fourth floor to the third floor by means of the ladder provided for such purposes, he could not reach the west manway, which was admittedly in perfect order, except by passing by an ore chute, a timber slide and an inclined chute, and it was the claim of the plaintiff in his complaint that this slide and these chutes occupied all of the space between the two walls of the stope on the third floor, and that there was not enough room for a man to pass by these objects.

In order that this court may clearly understand the conditions existing in this stope on the night of plaintiff's

accident, and the manner in which plaintiff received his injuries, we insert here a diagram, which represents the west stope of the 400 foot level of this mine, shows the four floors, the two manways, one in the east end and the other in the west end, the ore chute, inclined chute and timber slide as they existed on the night of plaintiff's injury, and the plank from which the plaintiff fell.



SCALE: ONE INCH EQUALS TWENTY FEET.

As before stated, this accident occurred in what was known as the west stope of the 400 foot level of the mine. This stope was approximately sixty feet in length. It had been opened and worked up to and including the third floor and Johnson was engaged in work upon the fourth floor on the night of the accident. The stope was provided with two manways, one of which has been called in the transcript the west manway, and the other one the east manway. The west manway had been extended from the sill floor, or level, to the third floor and was provided with ladders, which were admittedly in good condition on

the night of the accident. (90). There was also what has been called in the transcript the east manway, which extended from the sill floor to the fourth floor.

This so-called east manway was not a permanent manway (126) but was only used temporarily while a given floor was being opened up, and as soon as such floor was opened up it was the custom to then extend the west manway upward and to provide the same with proper ladders; the east manway was merely for the convenience of laborers whose duty required them to attend the ore chute near the east end of the stope. (131). These two manways were about forty feet apart one from the other. (99). Extending from the first to the third floor, and between these two manways, was an ore chute and a timber slide, and from the ore chute on the third floor to the fourth floor there had been constructed an inclined chute into which rock, ore, etc., was shoveled as it was taken from the fourth floor. The position of these several objects is shown upon the plat.

Four night before Johnson's accident the ladder in the so-called east manway extending from the second floor to the third floor was broken, although still passable (54); on the third night before the accident the ladder was broken and had become partially covered with rock but was still in such condition that it could be used and was used by Johnson in going to and from his work (78). But on the night preceding his accident the plaintiff testified that the ladder had been broken into pieces and was so covered by rock that it could not be used, and that for that reason he went to the east end of the stope on the

second floor and from thence to the third floor by means of walking on a ledge of rock to perhaps one-half the distance between the two floors, and then across the plank which we have mentioned and which was laid from this ledge of rock to the cap on the third floor (78). This plank was an ordinary lagging six feet long, eight inches wide and three inches thick (60-70) and the end which rested upon the cap of the third floor was between two and a half and three feet higher than the end which rested on the ledge of rock (70). It was alleged in the complaint that Johnson could not use the west manway for the reason that in order to do so, he would have to traverse the third floor, pass the timber slide, ore chute and inclined chute and that there was not sufficient room for a man to pass beside these on account of the fact that the ore chute and timber slide and inclined chute occupied all of the space between the two walls of the stope at that point. (21).

It was charged in the complaint that the defendant had failed in the discharge of its duties to furnish its employees with a reasonably safe place to work, by reason of the fact that it had failed to repair or replace the ladder in the east manway between the second and third floors, necessitating the use of this plank as a means of going from the second to the third floor (25); that it had failed to securely fasten this plank and had permitted the same to become wet and slippery; that it had failed to timber out to the face of the stope underneath this plank and had failed to provide any other means by which the employee could go to and from his work on the fourth

floor, it being alleged that it was impossible to use the west manway on account of the existence of the ore chute and timber slide.

It was not contended that any of these conditions, upon which the several charges of negligence were predicated, were unknown to or not fully appreciated by the plaintiff, but it was alleged in the complaint that he had notified the shift boss under whom he worked of this broken ladder and had been instructed by this shift boss to use the plank until a new ladder was provided and that the shift boss had promised to immediately replace the broken ladder. (par. VI., p. 23).

The defendant by its answer admitted the nature and extent of the plaintiff's injuries. (39). It contended that the so-called east manway was not a permanent manway, but was constructed for use of the miners to permit them to get to the chute near the east manway for the purpose of cleaning the same; it alleged that defendant had furnished its employees with a safe manway provided with proper ladders near the west end of the stope, and that the only proper way for the plaintiff to have descended from the place where he was working on the fourth floor to the sill floor, on the night of his accident, was to use the ladder at the east end of the stope from the fourth floor to the third floor, then travel along the third floor, passing the timber slide, ore chute and inclined chute, to the west manway, and descend by means of this manway upon the ladders therein provided; defendant also alleged that it had no knowledge of the existence of this plank until after the accident, defendant denying that plaintiff

had ever notified the shift boss of the existence of the same or made any complaint to such shift boss whatsoever. (32). And the defendant alleged that it had provided a rope and windlass in the timber slide for the purpose of sending machines, steel and other objects up and down between floors, and that the plaintiff should have used this timber slide in sending down his machine rather than to have carried the same. The defendant also set up the defenses of contributory negligence and assumption of risk.

Upon the trial it was proven that the plaintiff was a man 33 years old (73); had worked in the Hunter mine for about four years (74); he had worked in the west stope of the four hundred foot level where the accident occurred for three or four weeks (89); and on all the floors of this stope (90); he had helped open the first, second and third floors in the west stope on the four hundred foot level (90). It was the custom in this mine to open the stopes from the west end and as soon as the rock, ore, etc., had been taken down sufficiently to permit of doing so, the west manway would be extended upward to the floor which was being worked and a ladder then put in the manway (90); and the reason that the west manway had not on the night of the accident been extended from the third floor to the fourth floor was because of the fact that the rock and earth and ore had not been taken down sufficiently to permit of the extension of the west manway at that time. (126). The plaintiff, however, knew of the existence of this west manway, and had gone up and down the same (91). Johnson had also walked on the third floor between

the east and west manways and knew that there was sufficient room to pass the ore chute and had used this way in going to the fourth floor (97). Holmi, the plaintiff's only witness, also knew of this west manway and had used the same as a means of getting to the fourth floor (66), and in doing so had passed the ore chute and inclined chute on the third floor (67-68). And the plaintiff also knew of the existence of this windlass in the timber slide as a means of hoisting machinery, drills, etc., (92). Shaw, the shift boss, a witness for the defendant, passed the ore chute, inclined chute and timber slide on the third floor without difficulty after plaintiff's accident but on the same night (122-123-136) and there was no danger in going this way (143); Lamberton, another of defendant's witnesses had gone past these alleged obstructions on the third floor the night before the accident (150) and says even a man carrying a machine drill would have no difficulty in getting by (152-160); Pellecier, another witness for the defendant went this same way without difficulty and without danger (158-159-160) and on the same night of Johnson's injury he passed the chute and slides on the third floor (164); and Ashland, the machine man who took Johnson's place after his injury went this same way (168.)

So far as the evidence discloses, neither Johnson nor Holmi had attempted to pass these alleged obstructions on the third floor on the night of the accident, or on the night before, and were simply speculating when they intimate that it was not a practical way to go from the fourth floor to the sill floor in this manner. In fact, Holmi does not testify that it was impossible to go this way but merely

that he didn't think a man carrying a drill could get by the ore chute and inclined chute on the third floor (56).

It was Johnson himself who found this plank (96); he did not examine the same but began using it the night before his accident. And it was he who told Holmi of its existence (65). He used it on the night preceding his accident (65). But plaintiff sought to avoid the charge that he had assumed the obvious risk of passing over this plank carrying his drill by detailing a conversation between himself and Shaw, the shift boss, which he says occurred on the night preceding his accident. (80-81). The substance of this conversation was that Shaw came up to the place where plaintiff was working and asked him how he got up; that plaintiff replied that it was hard to get up and that it would be better to get a ladder and that thereupon Shaw told him that he would have the timberman put a ladder in. Upon which conversation the plaintiff bases the allegation of his complaint that he had notified the master of the existence of this broken ladder and of the fact that he was required to use this plank in going to and from his work, and the allegation of a promise on the part of the master to remedy this condition. (79-80).

The shift boss denies this conversation (129-130), and alleges that he did not even know of the existence of this plank prior to the accident to Johnson (120-130) nor who put the plank in (144). He testified further that there was at least two feet of space in which to walk by the ore chute on the third floor (136) and no danger in going so. (143).

It was also shown that the ladder which had been broken was not as a matter of fact, a part of any manway; the plaintiff says he did not know whether the broken ladder was a part of a regular manway or not (90), but the evidence of defendant's witnesses is clearly to the effect that this was not a regular manway (112-126-146), and that the only mayway which the men were expected to use was the manway near the west end of the stope.

As before stated, it was also chargd as negligence for the defendant to have left the floors beneath this plank untimbered. It was shown, however, that the reason for this was that it is a custom, not only in this mine, but in others as well, to run a sufficient distance to put in a set of timbers before doing any timbering (121); these sets are placed six feet apart and the only place untimbered on the night of the accident was the short distance from the last set of timbers to the face of the stope, and less than the distance between two sets of timbers (121).

Summarizing then, the issues in this case, it will be observed that defendant is charged with being negligent in that it had not provided a ladder in the so-called east manway between the second and third floors, necessitating the use of this plank; and that it had not timbered beneath this plank. Plaintiff knew the danger to which he was subjected by the use of such plank, but claims a suspension of the doctrine of the assumption of risk on account of an alleged promise of the master to remedy the danger.

Defendant on the other hand explains the reason that it had not timbered clear to the face of the stope

by the fact that work had not been carried on far enough in that direction to permit of the putting in of a set of timbers; denies any knowledge of the existence of this plank prior to plaintiff's injury, denies any promise to remove any danger known to it, and asserted that it had provided another perfectly safe way for plaintiff to go to and from his work on the fourth floor by means of the west manway.

SPECIFICATIONS OF ERROR.

I.

The defendant assigns the following errors:

The court erred in denying defendant's motion for a directed verdict and in refusing to instruct the jury to return a verdict in favor of the defendant at the close of the evidence for the following reasons, to-wit:

1. Because it appeared from all the evidence adduced in this case that there was no actionable negligence on the part of the defendant which was the proximate cause of the injury complained of in plaintiff's complaint and in this case.
2. Because it appeared by the evidence that plaintiff knew and appreciated the risk to which he was subjected at the time of his injury, and that plaintiff therefore, assumed such risk, and that his injury resulted from an assumed risk.
3. Because it appeared by the evidence that the plaintiff at the time of his injury was guilty of contributory negligence in passing along a way which he knew to be

defective and dangerous, and that plaintiff's injury resulted from his own contributory negligence.

4. Because it appeared from the evidence that if the place where the plaintiff was injured was unsafe, that such place had been rendered unsafe by the act of a fellow servant.

5. Because it appeared from plaintiff's complaint and the evidence adduced in this case that the only act of negligence charged against this defendant was the failure to repair a ladder between the second and third floors, and that such failure on the part of the defendant was not the proximate cause of the plaintiff's injury.

6. Because it appears that the plaintiff was injured while passing along an unsafe way which he had adopted, uninfluenced by any act of the defendant rather than to pass along a safe way which had been provided by the defendant, and was therefore guilty of contributory negligence at the time of his injury.

7. Because of the insufficiency of the evidence to sustain any verdict or judgment in favor of the plaintiff, for the following reasons, to-wit:

(a) There is no evidence of any negligence on the part of the defendant which was the proximate cause of the injury to the plaintiff. While the evidence does disclose the fact that a short time prior to plaintiff's accident one of the ladder leading from the third to the second floor of the stope where plaintiff was working had been broken, it does not appear that this condition was known to the defendant, or could have been known by a reason-

able inspection, nor does it appear from the evidence that the defective condition of this ladder was the proximate cause of plaintiff's injury, and it does appear from the evidence that there was another safe way known to the plaintiff by which he could safely descend from the third floor to the second floor, and the evidence further discloses that the proximate cause of plaintiff's injury was the fact that he selected a way of descending from the third floor to the second floor which he knew or believed to be unsafe and defective, and by which route he was not obliged or required to descend, and which unsafe way had been provided by the act of a fellow servant.

(b). The evidence discloses that the proximate cause of the plaintiff's injury was the negligence of a fellow servant or servants. In this respect the evidence shows that the plank or lagging upon which the plaintiff was attempting to cross at the time of his injury was used by the plaintiff and other employees after the ladder between the second and third floors had been broken; the chief witness for the plaintiff (John Holmi) testified that he was first told of the existence of this plank or lagging by either the plaintiff or another of his fellow workmen. In the absence of any proof that this way had been provided by the defendant as a means of going from the third to the second floor, or vice versa, it must be assumed that it was simply a means provided and adopted by the employees themselves as an easy mode of travel between these floors.

(c). The evidence discloses that the plaintiff negligently placed himself in an obviously dangerous position, name-

ly, upon the plank or lagging beneath which there were two open floors; the evidence shows that the plaintiff himself knew or believed this to be a dangerous position; and the evidence further shows that plaintiff need not have placed himself in such position but could have descended by another and safer route; the evidence further shows that whatever dangers were attendant upon walking over this inclined plank or lagging were open, obvious and as well known, understood and appreciated by the plaintiff as they could possibly have been by the defendant, and that in choosing and electing to go by such obviously dangerous route the plaintiff was guilty of negligence per se and assumed the risk as a matter of law.

(d). And for the same reason and in the same particulars as mentioned in the foregoing specifications (c) the plaintiff was guilty of gross contributory negligence in attempting to pass over said plank or lagging.

II.

The court erred in refusing to instruct the jury as requested by defendant's instruction numbered 1, which was as follows, to-wit:

"I instruct you that where a person injured seeks to recover on the ground that the employer has promised to repair, he must show that in doing what he did or subjecting himself to the danger that he could not foresee or anticipate the injury and that there was no other reasonable or equally safe way of going than the way he went. And if you should believe in this case that there was another way provided,

which was the method usually provided in such mines for employees going from one floor to the other, and that the plaintiff could have gone that way on the night he was injured, then I instruct you that he would not have been justified in taking a more dangerous way if it was not the usual way provided by the employer and that any promise of providing another way would not furnish him a justification for subjecting himself to an additional danger."

III.

The court erred in refusing to instruct the jury as requested by defendant's instruction numbered 2, which was as follows, to-wit:

"An employee who knows and appreciates the hazard of his service and the risk which is apparent to ordinary observation assumes the risk incident to the same, and where the defect is as obvious and well known to the employee as to employer, the employee assumes the risk thereof as one of the ordinary risks of business or employment. If, in the case now before you, you believe that the defect or danger was one which the plaintiff knew and appreciated, as well as the employer, then it was such a risk as an employee assumes."

IV.

The court erred in giving the following portion of his oral instructions to the jury, to-wit:

"Some of you were upon the jury that tried the

last case, and you heard the instructions that were given them. The principles of law are in a great many respects the same in this case as they were in that. But in some respects there are different features, and some of you were not upon that jury, and hence I shall instruct you fully in this case, and those of you who were in the other case will lay aside any recollection that you may have of what was said in that case."

V.

The court erred in giving the following portion of his oral instructions to the jury to-wit:

"Even though you should find that the defendant was negligent, even though you should find that the plaintiff was negligent, he might still be debarred from recovering under the rule commonly referred to as the assumption of risk by an employee. I will explain that to you in this way. If one, being in the employ of another, uses a tool or piece of machinery which is defective, or works in a place which is dangerous, and he, the employee, knows of the defect or the dangerous condition, and, by reason of his age and intelligence and experience, is able to appreciate the peril of using such defective device or machine, or the peril from such dangerous conditions, in the place where he works, then the general rule is that he impliedly agrees to take the chance, he relieves his employer from that chance. I explained that to you upon the other jury by the use

of a very familiar and simple device and perhaps it is as good an illustration as I can give you now. If one of you, being a farmer, employs a farm hand and, we will say, puts into his hands an axe or a pitchfork with a cracked handle, and the employee knows nothing about it, and uses the device, ignorant of the weakness of the handle, and is injured as a consequence, then the employer is held responsible for his negligence in not furnishing him with a reasonably safe device; but if, upon placing such axe or pitchfork in the hands of his employee, he calls his attention to it, and the employee is able to appreciate, as is the employer, the danger of using a pitchfork or axe in that condition, then if he goes on and uses it, he can make no complaint if he sustains injury, because he impliedly agrees to take the chance.

VI.

The court erred in giving the following portion of his oral instruction to the jury, to-wit:

“The plaintiff cannot recover unless the defendant was negligent, and unless such negligence contributed to or caused the accident.”

ARGUMENT.

The plaintiff in this case was a miner thirty-three years old, had had ten years' experience in underground quartz mining, four years of which time he had worked in the defendant's mine; he was familiar with the west stope,

where the accident occurred, had been one of the few men engaged in the work of opening the first four floors of this stope, he knew the existence of the west manway, the location of the ladders therein and their condition; he knew the location and position of the timber slide, ore slide, and inclined chute or rock slide as it has been called in the evidence; he was the first man shown to have known of the existence of this plank, and the fact that it was being used in lieu of a ladder between the second and third floors, was one of the few men to use the plank, and told his fellow-workmen of its existence. Every defect and every condition existing in the place where he was required to work, and upon which the several charges of negligence in this case are predicated were known to the plaintiff; he knew of the broken ladder between the second and third floors in the east manway, and had used this ladder in its broken condition for two nights; he had used the plank for two nights before there is any claim that he complained of these conditions; he knew by what means the west manway was accessible to a workman whose labors called him east of the ore chute, timber slide and rock slide. And if the west manway was inaccessible by reason of it being impossible for a person to pass beside the timber slide, ore chute and rock slide on the third floor, this fact was also known to the plaintiff; he knew also, and when he used the plank could plainly see, its size and its condition as to being wet and slippery, and the fact that there was no timbering beneath the same; all of these defective or dangerous conditions were obvious to a casual inspection and were known to the plaintiff at least two

days, if not three or four days before his accident, and whatever dangers there were arising from the defendant's failure, if there was a failure, to discharge its duties towards the plaintiff, were at all times apparent, required no warning from the master, and were of such a character that they must have been known and appreciated by the plaintiff. There was nothing hidden about the dangers; they were plain, open and apparent, and it is not claimed otherwise.

We contend therefore that the plaintiff is barred of any right of recovery in this case as a matter of law for the following reasons:

I. For the reason that every defect or condition or danger of which the plaintiff complains was open, obvious, known to and appreciated by the plaintiff, and that he therefore assumed the risk. (Assignment of Error, Nos. 1-2, 1-7-c).

II. For the reason that the alleged conversation between the plaintiff and the shift boss was insufficient to constitute a complaint of the defect or condition which plaintiff considered dangerous to himself, but was simply a complaint of an inconvenience, or a condition rendering his going to and from his work more difficult, unaccompanied by any statement of the servant's from which it could reasonably be inferred that he intended to quit the employment if the danger was not removed.

III. For the reason that the alleged promise to remove such danger was insufficient to relieve plaintiff of the assumption of risk, but was merely a casual remark of the

shift boss, made without reference to any complaint of the servant, and did not constitute a promise to repair a defect or remove a danger.

IV. For the reason that there is an entire absence of any testimony from which it could reasonably be inferred that the plaintiff was induced to continue in the employ of the defendant by reason of any promise or statement of the master.

V. For the reason that the accident to the plaintiff occurred after the expiration of a reasonable time within which to provide the ladder in the east manway by reason of the absence of which plaintiff asserts he was injured.

VI. For the reason that the doctrine that a promise to repair a defect or remove a danger, relied on by a servant, relieves the servant of the assumption of risk, does not apply to cases where the servant is engaged in ordinary labor or the tools used are only those of simple construction with which the servant is as familiar as the master.

VII. For the reason that there is an entire absence of any proof of any negligence on the part of the defendant which was the proximate cause of plaintiff's injury.
(Assignment of Error Nos. 1-5).

VIII. For the reason that the plaintiff was guilty of contributory negligence as a matter of law (1) in continuing to use an instrumentality the danger from the use of which was imminent and such as no prudent man would consent to incur, and, (2), because at the time of the injury to the plaintiff he was using a way which was dangerous

in preference to a safe and convenient way provided by the master, and, (3), because at the time of plaintiff's accident he was guilty of negligence in attempting to descend said plank while carrying a weighty drill, and, (4), for the reason that the plaintiff in attempting to walk across this plank carrying a heavy drill did not use the degree of care commensurate with the increased risk of which he had full knowledge. (Assignment of Error, Nos. 1-3, 1-6).

I. THE PLAINTIFF ASSUMED THE RISK OF WALKING OVER THIS PLANK, CARRYING HIS DRILL, AND HAVING ASSUMED THE RISK IS PRECLUDED FROM A RECOVERY IN THIS CASE.

The general rule as to the assumption of risk is stated by Mr. Labatt (Volume 4, Section 1313, Labatt's Master & Servant), to be that an adult of ordinary intelligence is presumed to have been capable of ascertaining every fact which could have been apprehended by the senses of a person having the same opportunities as he had of exercising those senses in relation to the dangerous conditions which caused the injury. And in the foot note to the section we have just mentioned the author has collected and cited numerous cases in support of this general proposition.

This is the effect, also, of the decisions of this court. And in the comparatively late case of Williams vs. Bunker Hill & Sullivan, 200 Federal 211, where it was held that the laborer had not assumed the risk of the condition through which he suffered an injury, this court did not depart

from the general rule but rather adhered to the same and said in the course of the opinion at page 214:

"Of course, an employee who knows and appreciates the hazards of his service, and those risks which are apparent to ordinary observation, assumes those risks incident to his situation. Neither do we lose thought of the established rule that when a defect is obvious, or so patent as to be readily observed by a servant by the reasonable use of his senses, having in view his age, intelligence, and experience, and the danger and risk from it are apparent, the servant will not be heard to say that he did not realize or appreciate them."

The general rule that a servant assumes the risk of defects and dangers which are open and obvious to him is well established in the Federal Courts.

Burke vs. Union Coal & Coke Company, 157
Federal 178,

Southern Railway Company vs. Lyons, 169 Fed-
eral 557,

Union Consolidated Mining Company vs. Bateman, 176 Federal 57,

Chicago B. & Q. R. Company vs. Shalstrom, 195
Federal 725.

It is needless to refer the court to the many cases upholding this general doctrine, for we firmly believe that neither the plaintiff nor his counsel would contend for one

moment that plaintiff could recover under the facts in this case, in the absence of any notification or complaint to the master of the alleged dangerous conditions through which he suffered his injuries. And believing that the only basis upon which it can seriously be contended that plaintiff can maintain his action for his injuries must be based upon his alleged complaint to the shift boss and the latter's promise to put in a new ladder, we proceed to a consideration of the sufficiency of such complaint and promise.

II. THE COMPLAINT OF THE SERVANT TO THE SHIFT BOSS WAS INSUFFICIENT.

In order to relieve the servant from assumption of risks or defects which are obvious, open and known to and appreciated by such servant, by a promise of the master to repair the defect or remove the danger, it is necessary for the plaintiff to allege and prove: First, that there was a complaint made to the master of a defect or danger which the servant considered dangerous to himself, and which the servant is unwilling to assume and that he intends to quit the employment unless such defect is remedied or such danger removed; second, that the master promised to remedy the defect or remove the danger; and third that the servant continued in the employment because of his reliance on the promise of the master, and that such promise was the inducement for the servant continuing in the employment.

4 Labatt's Master & Servant, Section 1342.

2 Cooley on Torts, p. 1156.

26 Cyc. p. 1208 (2-e).

The only evidence of a complaint of the servant in this case or of a promise to change conditions, and in fact the only reference to such a complaint or promise, is found on pages 80 and 81 of the record, and consisted of the following colloquy between Shaw, the shift boss, and the plaintiff:

Shaw came up, and he said, "this is like a whore house; a man can't get up here no way;" he said, "How did you get up here?" And I said, "It is pretty hard to get up here; you have to go like a rabbit on the timbers here, but you better get a ladder here," and he said, "Yes, I get the timber men to put them ladder over there; I get the timber men to put the ladder over there." (80).

The night before I get hurt. He said, "You go that way now, on the plank, so long as the timber men come up here. I get the timber men up here as quick as I can to put that ladder there." (80).

Q. Was there anything else said about ladders?

A. No. He said he go and fix that. He said he give the foreman orders already, the day before, that he sent the ladder in, you know, that he gave orders to make the ladder and send in the ladder." (81).

The plaintiff in this case knew of the broken condition of the ladder between the second and third floors and of the existence and use of this plank as a means of going from the second to the third floor; he had used this mode of

going to and from his work for two or three days before his accident; he does not testify that he ever considered it dangerous to use such plank, but if there was any risk in walking over this plank the danger of doing so must have been known and appreciated by the plaintiff. So far as the evidence discloses he never made an effort to notify the master of this condition after he ascertained that the ladder had been broken, but went on working and waited for the chance conversation with Shaw on the night preceding his accident. He did not even then complain to Shaw of the broken ladder, nor of the fact that servants were compelled to use this plank on account of such broken ladder. The conversation was opened by Shaw, himself, and there is nothing in the entire conversation between the servant and the shift boss which indicates that either one of them considered the use of this plank dangerous. On the contrary, it is apparent that both parties referred only to the inconvenience of the servant having to walk from the place where the ladder had been, to the end of the stope, and thence up to the next floor by means of the ledge of rock and the plank. We are familiar with the rule that the evidence of a complaint to the master should be liberally construed, but nevertheless there must be sufficient evidence of a notification or a complaint from which it may fairly be inferred that the servant was complaining of a dangerous condition,—was complaining on his own account of a condition which subjected him to an added danger, which he is unwilling to assume, and that he intends to quit the service unless such danger is removed or assumed by the master. The only notification or complaint

made to Shaw by the plaintiff was, "It is pretty hard to get up here; we have to go like a rabbit on the timbers here, but you better get a ladder here"; merely a complaint of an inconvenient means of going to and from his work,—a complaint of a condition which made it more difficult for the servant to go to and from his work.

It is stated in Volume 4, Labatt's Master and Servant, Section 1343, that the responsibility for a servant's injury will not be shifted to the master where the complaint is merely that a certain defect increases the difficulty of the work, or renders the performance of the servant's duty more inconvenient.

The case of St. Louis & S. F. R. Company vs. Mealman 97 Pacific, 381, is very much in point so far as the nature of the complaint of the servant and master's promise to repair on which the servant based his right to recover is concerned. The servant in that case had been using a hand car furnished by the railroad company upon which the brakes had become worn, defective and practically worthless. The complaint relied upon consisted of a conversation between the foreman and the servant in which the servant advised the foreman of the condition of the brakes, telling him that they were out of order and worthless, and needed repairing; the foreman ordered the servant to go ahead and use the car, and that he would fix it or have it fixed. And the servant in that case testified that he continued to work only because of the promise of the foreman to have the car repaired. Nevertheless, the promise in that case was held to be absolutely insufficient to relieve the servant from assuming the risk, on account

of the fact that there was nothing in the complaint to indicate that the servant apprehended a danger from the use of the car; his evidence on the contrary indicating that he complained of the condition of such hand car as a matter of convenience in handling the car, and that he did not continue in the service on account of the promise of the foreman to have the same repaired.

And in Gowen vs. Harley (C. C. A. 8th Circuit) 56 Fed. 973, where it was the servant's duty to move a box weighing 250 pounds a distance of five feet from one railroad car to another, and where the servant had asked for and been promised skids whereon to slide the box, such being a more convenient way of moving the same, it was held that this complaint and promise to furnish skids did not relieve the servant from assuming the risk of moving such box in the ordinary way, because of the fact that the complaint was made and the skids asked for merely because it would be easier for the servant to move the box by this means than in the manner in which he had been doing so. And the court said in that case, speaking through Justice Sanborn, "A servant who is employed to perform a simple act of manual labor, the risks of which are obvious, cannot escape from his assumption of those risks by proof that the master promised to furnish him tools by the use of which his work could be done in a different way, or more conveniently, or even more safely, if it could be done with reasonable safety without the tools."

So in the case of Texas & P. Ry. Company vs. Nichols, 92 S. W. 411, where a depot employee had complained of the

slippery condition of the platform not because of any apprehension of danger, but merely for the comfort of himself and others it was held that he could not escape from assuming the risk therefrom because of such complaint.

And in Lewis vs. New York & New England R. Co., 153 Mass. 73, 23 N. E. 431, 10 L. R. A. 513, where a pier upon which the servant was required to walk had become obviously decayed and the servant had complained to the master of its condition, saying that some one was going to get hurt, that several people had already fallen through and if left in its decayed condition somebody was going to get badly injured, and the master had promised that he would have carpenters overhaul and repair the pier as soon as they could get to it, the complaint was held insufficient, and the servant was held to have assumed the risk of his continuance in the employment and use of this pier, the decision being based partially upon the insufficiency of the complaint but also upon the lack of any evidence showing or attempting to show that plaintiff's continuance in the employment was induced by a promise to repair.

And in Balle vs. Detroit Leather Company, 41 N. W. 216, where the servant was killed by falling into a vat in a tannery, presumably stumbling over a box near such vat, and where the only complaint was that this box was in his way, it was held that this complaint and promise of the master to change the condition did not relieve him from assuming the risk.

There is absolutely nothing in the conversation between the plaintiff and the shift boss from which it could rea-

sonably be inferred that either the servant or the shift boss anticipated any danger whatsoever from the use of this plank. The plaintiff, himself, had a more intimate knowledge of conditions in the west stope than any employee of the defendant,—more intimate doubtless than the knowledge of the master himself. He had known of this broken ladder and of the use of this plank for several days and had made no complaint, and had not even notified the master of this condition. His conversation with Shaw was merely a casual one with reference to an inconvenient and difficult way of going to and from his work.

Neither is there anything in this conversation from which it could fairly be inferred that the servant had any intention whatsoever of leaving the defendant's employ on account of this broken ladder unless the master would put in a new ladder or agree to assume the risk until such new ladder was provided. And there must always be some evidence from which it can reasonably be inferred that the servant is complaining of a danger threatening him, which he is unwilling to assume and that he intends to quit the employment unless such danger is removed.

Morden Frog & Crossings Works vs. Fries, 81
N. E. 862.

Myhra vs. Chicago M. & P. Ry. Co., 112 Pac. 939.

In both of the above cases the evidence of an intention to quit the service was held sufficient but the rule that such evidence is necessary is clearly stated.

In the present case the servant had worked several

days under identically the same conditions and without complaint and there is nothing to indicate that it had ever occurred to him to complain of the broken ladder and of this plank as a danger, or that it had ever entered his mind that he would not continue in the defendant's employ unless there was a change of conditions.

III. THE ALLEGED PROMISE OF THE SHIFT BOSS WAS INSUFFICIENT TO RELIEVE PLAINTIFF OF THE ASSUMPTION OF THE RISK INCIDENT TO THE USE OF THIS PLANK.

In order for the promise of the master to be sufficient to relieve the servant of the assumption of an obvious risk it must be of such a nature that the jury can reasonably infer that the master, in recognition of the existence of some dangerous condition, as an inducement for the continuance of the servant in the employment agreed to assume the risk until such time as the master can make good his promise to repair the defect or remove the dangerous condition. We do not contend for one moment that an express promise is necessary, but there must be some evidence from which the jury can infer that a condition known to both the master and servant to be dangerous had arisen, and that the master had promised to remove such danger in order to induce the servant to continue in his employ.

There is nothing in the evidence in this case which we have already quoted, from which a jury could infer that Shaw's statement that he was going to have the timbermen put a ladder in the east manway was made because

of any complaint that the plaintiff had made, or as an inducement to the plaintiff to continue in the employ. The plaintiff had known of this condition, several days; according to the testimony of the plaintiff, Shaw had ascertained it on the night of this conversation and without any complaint, but simply because of a knowledge on his part that the ladder was broken, he made the casual statement that he intended to have the timbermen put in a ladder. It is well to remember at all times when speaking of this conversation between Shaw and the shift boss that Shaw flatly denies that any such conversation ever occurred. (129-130). And even the statements accredited to Shaw by plaintiff's testimony do not indicate that Shaw's expressed intention of putting in a ladder had any reference to the protection of plaintiff or to the servants or that it was anything more than a promise to provide a more convenient way of going between the second and third floors.

Somewhat similar promises to change existing conditions were held to be insufficient in *Industrial Lumber Company vs. Johnson*, 55 S. W. 362, where the brakeman complained of pulling derailed cars because of a defective draw head and the defendant's agent then told the carpenter to fix the drawhead immediately, and the plaintiff continuing to use it with knowledge of its defective condition was injured and it was held that the instructions of the agent to repair the drawhead were intended to facilitate the master's business and not for the employee's protection, and was not such a promise to repair as would relieve the plaintiff from the assumption of the risk of

using it, and Gulf C. & S. F. Ry. Company vs. Garren, 74 S. W. 897, where a locomotive fireman was injured in attempting to use a defective engine step, the defect in which had been noticed by both himself and the engineer, and the engineer after having tried to fix the step himself, told the fireman that he would have it fixed and it was held that this promise to have the step fixed was insufficient to relieve the fireman of assuming the risk and using the defective step. It will be noticed in the latter case that the promise is practically the same as in the present case. Without any complaint about the use of this plank, necessitated by such broken ladder, as dangerous, Shaw volunteered to have a new ladder put in the east manway; his promise to do so was not actuated by any idea on his part or on the part of the plaintiff that a dangerous condition had arisen and was not made as an inducement to the plaintiff to continue in the employ, but was only a casual statement of the shift boss.

IV. PLAINTIFF WAS NOT INDUCED TO REMAIN IN DEFENDANT'S EMPLOY BY A PROMISE TO REPAIR A DEFECT OR REMOVE A DANGER.

The evidence in this case is absolutely silent upon the question of the plaintiff being induced to continue in the employ of the defendant by reason of any promise to place a ladder between the second and third floors in the east end of the stope. The plaintiff himself could best have told whether or not he continued in the employ by reason of his conversation with Shaw, but he does not claim that this conversation influenced him in any degree whatsoever so far as his continuance in the employ

of the defendant was concerned. That such promise would not have this result is amply established by the fact that plaintiff, who was more familiar with conditions in the west stope from the sill floor up to the fourth floor than any one in the defendant's employ, had known of this broken ladder for at least four nights before his accident, and had never complained or even notified the master of its broken condition, nor of the use of this plank, but had used the plank without complaint. There is nothing in the evidence to indicate that his use of the plank after his conversation with Shaw was different in any manner, or induced by different considerations, or prompted by different reasons, than his use of the same before his conversation with Shaw. There is nothing in his evidence to indicate, or from which a jury could possibly infer, that he would not have continued in the employ of the defendant, or that he would not have continued to use this plank, if it had not been for the promise of Shaw.

It is absolutely essential in every case where a servant is injured through obvious defects or conditions and seeks to recover by reason of his complaint and a promise to repair, that he shall affirmatively establish the fact that he was induced to continue to labor under such dangerous conditions, or use such defective machinery or instrumentalities, by reason of the master's promise and by reason of his reliance thereon.

In 26 Cyc. page 1212, sub-division (4), the rule is stated as follows:

“In order that a servant may be relieved from the

operation of the doctrine of assumed risk from a defect complained of and the danger of which he was no longer willing to incur, it is essential that his remaining in the employment was induced by the promise of the master to remedy the defect, when he would not otherwise have done so."

And in 4 Labatt's Master and Servant, Section 1345, the rule is thus stated:

"After the servant has shown that there has been a promise, actual or implied, on the part of the master, and that this promise amounts to an undertaking to remove not only a danger, but a danger by which he himself is threatened, he still has the onus of proving that the inducing motive of his continuance in the employment was his reliance upon the fulfillment of the promise.

In Bodwell vs. Nashus Mfg. Company, 47 Atl., 613, the servant was injured by catching his foot on a pile of planks, his view of which was obstructed by the escape of steam from a pipe nearby, complaint of which pipe had been made and a promise made by the master to repair the same. It was held that there could be no recovery since there was no evidence to show that the servant relied on this promise to repair, or that he would have quit the employment except for such promise.

In Showalter vs. Fairbanks, Morse & Company, 60 N. W. 257, the master had promised to remove a danger but the servant had continued in the employment, not so much relying on such promise as on assurances of the

master that there was in fact no danger, and the Supreme Court of Wisconsin held in that case, that the servant assumed the risk on account of the fact that it was not shown that he had continued in the employment relying on the master's promise to remove the danger. The court called attention to the fact that there was no evidence that the servant had relied on the promise to remove the danger and said "there must be reliance on the promise to repair, in order to make such a promise of any avail as an excuse to the employee."

In Roy vs. Hodge, 66 Atl. 123, the servant was injured by coming in contact with a bench saw while attempting to throw a piece of edging upon a pile of the same, which had been permitted to accumulate. About a week before the accident, and also on the day of the accident, the servant had complained of this accumulation of edging because he feared danger therefrom, and the master had promised through its superintendent that the danger would be removed as soon as he got around to it. The decision of the Supreme Court of New Hampshire is based entirely upon the ground that there was an entire lack of evidence to show that the plaintiff was induced to remain in the defendant's services by reason of the master's promise to remove the pile of edging.

And in Morden Frog & Crossings Works vs. Fries, 81 N. E. 862, it is expressly held that the right of a servant to recover for personal injuries upon a promise to repair, rests upon the fact that the servant is induced by such promise to continue in the employment, and that if the promise to remedy the defect did not induce the plaintiff

to remain in the service when he would otherwise have abandoned it, the promise would have no effect to create a new relation.

Where there is any evidence to indicate that the servant did continue in the employment because of such promise the question is of course for the jury; but where, as in the present action, there is an entire absence of any testimony upon this question, and it is on the contrary shown that the servant had continued with full knowledge of such conditions for several days before the alleged complaint, and nothing to indicate that his continuance in the employment after such alleged promise was induced by such promise, then the proof of the complaint and promise to repair, without showing a reliance upon said promise, as the inducement for the servant's continuance in the employment, is absolutely insufficient to support a verdict.

And this is the effect of the following mentioned decisions:

Louisville & N. R. Co. vs. Goodwin, 131 S. W. 1012.

American Tobacco Company vs. Adams, 125 S. W. 1067.

Harris vs. Bottum, 70 Atl. 560.

St. Louis & S. F. R. Co. vs. Mealman, 97 Pae. 381.

Jones vs. Walker County Lumber Co. 162 S. W. 420.

We have referred to only a small number of the cases upon this question; there might be many others cited to the court. In fact, the cases in which recovery has been permitted, based on a promise to repair a defect or remove a danger, have all rested upon the fact proven and established in such cases that the promise to repair furnished the inducement and the reason for the continuance of the servant in an employment which he otherwise and in the absence of such promise to repair would have instantly quit. This is the basis upon which recovery has been sustained by the Supreme Court of the United States where in the statement of the rule of law, the right to recover has always been predicated upon the reliance of a servant upon the promise to repair, the burden of proving which reliance is upon the servant. Southwestern Brewery & Ice Company vs. Schmidt, 226 U. S. 161, 57 Law Ed. 170, in which the rule is stated in the following language:

“A master may remain liable for a certain time for a failure to use reasonable care in furnishing a safe place in which to work, notwithstanding the servant’s appreciation of the danger, IF HE INDUCES THE SERVANT TO KEEP ON BY A PROMISE THAT THE SOURCE OF TROUBLE SHALL BE REMOVED.”

Judge Cooley states the rule to be that:

“If the servant, having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall

be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good." 2 Cooley on Torts, (Third Edition, page 1156).

V. PLAINTIFF ASSUMED THE RISK BY CONTINUING TO WORK AFTER THE EXPIRATION OF A REASONABLE TIME WITHIN WHICH TO REPLACE THE LADDER BETWEEN THE SECOND AND THIRD FLOORS.

But even where there has been a sufficient complaint of a dangerous condition and a promise to repair, the time within which the repairs are to be made, or the danger removed not being stated, the servant is relieved from assuming the risk only during such time as is reasonable for the master to make good his promise to repair the defect or remove the danger. And when after the expiration of a reasonable time the servant continues to work with the defective instrumentality, or under the dangerous condition complained of, he assumes the risk.

Mr. Labatt says, (Volume 4, Section 1349):

"As soon as the period contemplated for the removal of the dangerous conditions terminated, the servant's position is precisely what it would have been if no promise had been given; that is to say, he reassumes the risk."

And in 26 Cyc. page 1212 (5), the rule is stated in the following language:

"If the servant remains in the employ longer than a reasonable time after the master's promise to repair the defect, he will be held to have assumed the risk.

"After a reasonable time has elapsed, or, if a definite time is fixed, then after that has expired, the risk is again upon the servant." 2 Cooley on Torts, page 1159.

And what is a reasonable time is to be determined by the time which might reasonably be required by the master in which to make the repairs. In the case at bar the repairs which the plaintiff says had been promised consisted merely of the putting in of a new ladder between the second and third floors. The plaintiff in his testimony (97-98) testified that the ladders were stock ladders of the uniform length of ten feet and were kept on the level of the mine ready to be taken to whatever point they were required, and that sometimes they were even kept in stock on different stations; he testifies that it would only take a few minutes to bring one of the ladders from whatever point they were kept in stock to the place where this ladder was to be put in the east manway. Yet the alleged promise to put in this new ladder was made more than twenty-four hours before plaintiff's accident. He had worked for four shifts while the ladder was broken without complaint, and even after his alleged complaint, and the alleged promise to replace the broken ladder with a new one, with full knowledge of the fact that it would only take a few minutes to replace this ladder, the plaintiff continued to work knowing that even if he

had considered the statement of Shaw as a promise to replace the ladder, that the promise had not been made good.

In Parker vs. Drakesboro Coal, Coke & Mining Company, 96 S. W. 575, it is said that:

“If a master’s promise to remedy a defect is not fulfilled in such time as would ordinarily and reasonably be required to remedy it, the servant by remaining in the employment, assumes the risk.”

It is not sufficient in a case like this one to say that the question of what is a reasonable time is to be left to the jury, when the only testimony upon this question is the testimony of the plaintiff himself in which he shows that the promise to change conditions could have been made good in a few minutes time and was not lived up to for more than twenty-four hours after the promise, and then in view of a full knowledge on his part that the danger had not been removed, he continued to work.

VI. A PROMISE TO REPAIR DOES NOT RELIEVE THE SERVANT OF ASSUMING THE RISKS INCIDENT TO THE USE OF INSTRUMENTALITIES OF SIMPLE CONSTRUCTION.

But even if the plaintiff in the present action had proven a sufficient complaint of a danger which he believed threatened him in the use of this plank as a means of going from the second to the third floor, and even though he had established beyond the peradventure of a doubt that he was induced to continue in the master’s employment because of the latter’s promise to remove such dan-

ger, he is still held to have assumed the risk of using common instrumentalities the defects in which and the dangers from using which are obvious and open to him and appreciated by him.

In 26 Cyc. page 1209, it is said that the rule which relieves a servant from assuming obvious risks where there has been a promise to repair does not apply in the case of ordinary labor with common implements with which the servant is perfectly familiar. And in the well considered case of Gunning System vs. Lapointe, 72 N. E. 383, the Supreme Court of Illinois, stated the rule in the following language:

“It is not in all cases that the servant may relieve himself from the assumption of the risk incident to defects and dangers of which he has full knowledge by exacting from the master a promise to repair. The cases where the rule of assumed risk is suspended, and the servant exempted from its application under a promise from the master to repair or cure the defect complained of, are those in which particular skill and experience are necessary to know and appreciate the defect and danger incident thereto, or where machinery and materials are used of which the servant can have little knowledge, and not those cases where the servant is engaged in ordinary labor, or the tools used are only those of simple constructions, with which the servant is as familiar and as fully understands as the master.”

And to the same effect are the following authorities:

Musser-Sauntry Land, Logging & Mfg. Co. vs.
Brown, 126 Fed. 141.

Marsh vs. Chickering, 5 N. E. 54, where the servant had notified the master that a ladder which he used in lighting gas lamps needed spiking and they had promised to repair it, but did not do so, and he was injured by reason of the slipping of the ladder, and it was held that the rule making the employer responsible for defective machinery, etc., does not extend to ordinary labor that requires the use of implements with which the employee is perfectly familiar.

Meador vs. Lake Shore & M. S. Ry. Company, 37 N. E. 721, which is also a case where the servant was injured while using a defective ladder after notification to the master of such defect, and a promise on the part of the master to furnish a new ladder, and in which the right of recovery was denied.

Webster Mfg. Company vs. Nesbitt, 68 N. E. 936, where a blacksmith was injured on account of the defective condition of a backing hammer, after a complaint and promise to repair, and where it was held that he could not recover.

Brewer vs. Tennessee Coal, Iron & Railway Company, 37 S. W. 549, where the servant was injured by falling from a trestle while walking on a plank which had become greatly worn, and where the servant had previously notified the master of the defect and was given a promise that the plank would be replaced by a new one, in which case the right of recovery was denied.

Corcoran vs. Milwaukee Gas-Light Company, 51 N. W. 328, in which the servant amply proved a defect in the ladder through which he was injured, a notification to the master of such defect, a promise of the master to put spikes on the ladder, the reliance on such promise by the servant and his subsequent injury, and yet the sustaining of a demurrer to the complaint upon the ground that it failed to state a cause of action for the reason that the danger from the use of the ladder might have been anticipated by the exercise of ordinary care on the part of the servant, was on appeal held to be proper.

And in Kistner vs. American Steel Foundries, 84 N. E. 44, the rule is stated as follows:

"The rule which exempts an employe from assuming the risk of injury because of defective machinery, where a promise of repair is made, applies only where particular skill and experience are necessary to appreciate the defect and the danger, or where he can have but little knowledge of the machinery, and does not apply where he is engaged in ordinary labor or the tools used are of simple construction with which he is as familiar as the master."

To the same effect are the following authorities:

McGill vs. Cleveland & S. W. Traction Co., 86 N. E. 989.

Stirling Coal & Coke Co. vs. Fork, 131 S. W. 1030.

Spencer vs. Worthington, 60 N. Y. Supp. 873

Dauche Iron Works vs. Nevin, 134 Ill. App. 475.

And in Gowen vs. Harley, 56 Fed. 982, after stating the law to be that a servant engaged in the performance of a simple act of manual labor the risks of which are obvious can not escape from assuming the risks thereof by proof that the master promised to furnish him tools by which his work could be done more safely, the court illustrates the application of this doctrine in the following manner:

"The errand boy whose duty it is to climb the stairs in a high building daily can not recover of his employer for a fall down the stairs on the ground that the latter had just promised to furnish him an elevator for his convenience or for his safety when the stairs themselves are reasonably safe. The mason who is placing heavy stones upon a wall by hand can not recover of his employer if he takes up one that is too heavy for him and it falls upon his feet, on the ground that his employer had just promised to furnish him an inclined plane upon which he could roll stones upon the wall." (Bottom of page 982).

And again:

"The rule that the master is responsible for damages resulting to a servant from defects in machinery and appliances of which the servant has notified him and which he has promised to repair governs cases in which machinery or tools that are used in the work are discovered to be dangerously defective while in use and to cases in which tools or machinery are necessary for the safe performance of the work.

It has no application to a case where the services required is simple manual labor without tools or machinery and where no such tools or appliances are necessary to the performance of the work with a reasonable degree of safety." (Top of page 983).

VII. THE FAILURE TO REPLACE OR REPAIR THE LADDER IN QUESTION WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S INJURY.

If it be admitted in this case that there was a defective or broken ladder between the second and third floors; that this condition had become known to the master by reason of a notification or complaint made to it by a servant, and if it is also admitted that the master promised to replace or repair such ladder, still the employee did not receive his injuries in trying to use the defective or broken ladder or in trying to go that way, but on the contrary he selected the most dangerous way there was, namely the plank, whereas the other manway was available to him and he might have sent his drill down the timber slide. The alleged promise to repair or replace this ladder, if indeed any such promise was made, was directed toward the ladder in the east manway and not toward the plank upon which the plaintiff was injured. There is no evidence in this case which brings home to the defendant a knowledge of the existence or use of this plank until after the accident to the plaintiff. Shaw testified that he did not know of its existence and this evidence is uncontradicted. (120). We have not lost sight of the testimony which we have quoted concerning the conversation between Shaw and the plaintiff, but it will be no-

ticed that the plaintiff did not at that time, and does not now claim that he did at any time notify Shaw of the existence or use of this plank. He merely stated that he had to get up to his place of work over the timbers like a rabbit. Shaw, on the other hand, flatly denies any knowledge of the existence of this plank, and also denies this conversation. (130).

It was the proof of this fact, i. e. that the shift boss, Shaw, even admitting plaintiff's testimony as to his conversation with Shaw to be true, had promised merely to replace a ladder in the east manway, while the plaintiff's injury was due to the use of a plank, the very existence of which was unknown to the master, and which was located many feet away from this broken ladder, that caused the trial court to hesitate as to whether or not he would send this case to the jury. (178).

The alleged promise to replace this ladder had absolutely nothing to do, one way or the other, with plaintiff's injury suffered by reason of falling from the plank as he did. The broken ladder, or the promise, if there was one, to replace the same, was not the proximate cause of plaintiff's injury.

VIII. THE PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE.

The proof in this case utterly fails to bring plaintiff within the exception which allows a recovery even though the plaintiff has been negligent, if he was relying on a promise to repair. Upon this point the evidence shows that there was open to the plaintiff a way of egress

through the west manway which was readily accessible, but only forty-five feet (173) from the place where the plaintiff was working; that this was the usual and customary way of egress (125), and that upon the night of the accident there was nothing but the plaintiff's own choice to prevent him from using that way of reaching the sill floor with his machine. (122).

The plaintiff's contention in this connection was based upon the theory that upon the night of the accident access to this west manway and the timber slide was blocked. But the plaintiff himself in his testimony (179) did not say positively that either the ore chute or whatever muck may have been near the same would have prevented him from going to the west manway ON THE NIGHT OF THE ACCIDENT. Plaintiff merely makes the general statement that "there was no chance to get by." (79). In fact, the evidence clearly shows that neither the plaintiff nor his witness, Holmi, had attempted to ascertain for themselves on the night before the accident or on the night of the accident whether or not they could ascend and descend by means of the west manway, or whether or not they could pass by the timber slide, ore chute and inclined chute on the third floor. Although they knew of the existence of this west manway, and both had used it in the past, on finding the ladder broken in the east manway, they voluntarily and purely from choice commenced the use of this plank, leading almost to the suspicion that one of them placed the plank in the position it was on the night of the accident, and never thereafter did they attempt to ascertain whether it was feasible to use the west manway. They do not know that it could not be used—

they merely speculate that it was not a practicable way to go up and down between the floors. On the other hand, we have the testimony of Shaw (122) where it was shown that there was between two feet and two and one-half feet of open passage way between the slide chute and the wall and this evidence is corroborated by Lamberton (150) by Pellecier (160) and by Ashland (168) and both Shaw and Lamberton's testimony relates to the facts as they existed on the night of plaintiff's accident (128-150). Shaw dissipates any contention of the plaintiff that the way to the west manway, under the ore chute was dangerous. (143). Shaw also testified, and his testimony is uncontradicted by any evidence or any inference, that upon the night of the accident there was no muck between the slide chute and the wall. Even the plaintiff's own witness, Holmi, testified that by stooping or bending slightly there was no difficulty in using the passage way between the slide chute and the wall. (68).

And the defendant also provided a safe way in which the plaintiff could have lowered the machine, which he from choice carried with him that night from the place where he was working to the sill floor. It is shown that he could have used the timber slide which was provided with a windlass (127) and further than this there is direct evidence, uncontradicted, that instructions had been given miners employed in the defendant's mine, that machines should be taken up and lowered by way of the timber slide. (128).

Plaintiff knew of the existence of the timber slide and that it was provided with a windlass to be used in tak-

ing machines up and down (92); he also knew of the west manway (90); and had used it many times (97). It is amply established by the evidence that a man carrying a machine such as the one which the plaintiff was using could have easily passed between the slide chute and the wall and then had open to him both the timber slide and the west manway (152-160); the two ways, and only two ways, which the defendant had authorized its employees to use as passage ways and in raising and lowering their machines.

The plaintiff relies strongly upon the contention that the east manway was not in a condition to be used as a passage way. This has no bearing at all upon the case for (at Tr. p. 112) Mr. Carey testified that the east manway was not a permanent manway and this is undisputed, and (at Tr. 146) Mr. Shaw testified that the east manway was only for the convenience of the chute and not for the miners to use. Instead, however, of sending down his machine by means of the timber slide and himself descending through the west manway the plaintiff, purely from choice, elected to carry his machine which weighed 75 pounds (93) and to walk over this eight-inch plank, which had a fall in six feet of between two and one-half and three feet—indeed a dangerous angle—and beneath which was an opening twenty feet or more in depth.

There is involved then in this case the question of whether plaintiff can recover for an injury occurring to him in electing to use the more hazardous one of two ways of performing an act, and the courts have held that this

choice of the more hazardous way acts as an absolute bar to the plaintiff's recovery, being considered as contributory negligence on the part of the plaintiff. This principle of law is best illustrated and applied in the case of *Gilbert v. Burlington C. R. & N. Company*, 128 Fed. 531, in which the plaintiff, a switchman, in a railway yard was injured in uncoupling switching freight cars. The cars were equipped with a safety coupling device which the plaintiff attempted to use but which failed to work. The court found from the evidence that there were two ways then open to the plaintiff of performing his work, the safer one to go around the end of the car and operate the coupling lever from the other side, while the hazardous way, and the one which the plaintiff took, was to step in between the cars and lift the pin. Upon this state of facts the court held: "The act of placing himself between the ends of the cars to uncouple them, without first endeavoring to do so by the use of the lever on the opposite side, was an act of negligence because the use of that lever was a less dangerous method of separating the cars. Where there is a comparatively safe and a more dangerous way known to a servant by means of which he may discharge his duty, it is a want of ordinary care for him to select and use the more dangerous method." *Morris v. Duluth S. S. & A. Ry. Co.*, 108 Fed. 747, 749, 47 C. C. A. 661-664; *Gowen v. Harley*, 56 Fed. 973, 983, 6 C. C. A. 190, 200; *Coal Co. v. Reid*, 85 Fed. 914, 29 C. C. A. 475; *McCain v. Railroad Co.*, 76 Fed. 125, 126, 22 C. C. A. 99, 101; *Russell v. Tillotson*, 140 Mass. 201, 4 N. E. 231; *Gleason v. Railway Co.*, 73 Fed. 647, 19 C. C. A. 636; *Cunningham v. Railway Co. (C. C.)* 17 Fed. 882;

English v. Railway Co. (C. C.) 24 Fed. 906.

Regarding his contributory negligence the court also said, "One whose negligence directly contributed to his injury cannot recover damages of another whose negligence concurred to cause it, although the carelessness of the latter was the more proximate cause of it. Pyle vs. Clark, 25 C. C. A. 190, 192, 79 Fed. 744, 746, 747; Motey v. Granite Co. 20 C. C. A. 366, 369, 74 Fed. 156, 159; Chicago & N. W. Ry. Co. v. Davis, 3 C. C. A. 429, 431, 53 Fed. 61, 63; Railway Co. vs. Moseley, 6 C. C. A. 641, 643, 646, 57 Fed. 921, 923, 925; Reynolds v. Railway Co. 16 C. C. A. 435, 69 Fed. 808, 811; Schofield v. Railway Co., 114 U. S. 615, 618, 5 Sup. Ct. 1125, 29 L. Ed. 224; Railroad Co. v. Houston, 95 U. S. 697, 702, 24 L. Ed. 542; Hayden v. Railway Co. 124 Mo. 556, 573, 28 S. W. 74; Wileox v. Railway Co., 39 N. Y. 358, 100 Am. Dec. 440.

There was a contention in the case at bar that the plaintiff was justified in using the passageway which he did use upon the ground that it was customary for those employed with him to use this same means. In Gilbert v. Burlington, etc., supra, the court, in discussing this same contention states: "If a man exposes himself to a risk unnecessarily he is guilty of negligence, although it be shown that other persons have done the same thing and escaped unhurt. The inherent quality of an act is • not changed whether done by one or many. (Citing Dawson v. Chicago R. I. & P. R. Co., 114 Fed. 870). The danger of entering and walking between the moving cars was so imminent and obvious that no custom to do so unnecessarily could deprive the act of its inherently negligent

character. (*Gilbert v. Burlington etc.*, 128 Fed. 535).

There is no evidence anywhere that any other employee there ever attempted to carry anything over the plank and no one else was ever so grossly negligent and careless as to attempt to carry a 75-pound drill over this plank, sloping as it was at an angle of over 30 degrees.

In the case of *King v. Woodward Iron Company* (Alabama), 59 Southern 264, the plaintiff elected to leave the mine by a tramway when there had been provided for his use a manway, and while leaving the mine over this tramway the plaintiff was struck by a car and killed. While the facts of that case show that the plaintiff had been warned not to use this particular tramway and instructed to use the manway, yet the court, in deciding the case, did not base its opinion wholly upon this positive violation by the plaintiff of his instructions and upon his failure to give heed to the warnings of the defendant, but states the general principle of law to be, "The plea clearly and certainly alleges that the intestate voluntarily selected this tramway, which was dangerous, when he knew there was a manway which was safe. This was negligence, voluntarily assumed—Knowing that one was safe and the other dangerous it was certainly negligence to select the dangerous way."

- Where there is a natural and safe method of performing his service, and the servant carelessly pursues the method that is obviously more dangerous, he is guilty of contributory negligence and cannot recover.

Russell v. Tillotson 140 Mass. 201.

And if it be assumed that the use of this plank was dangerous, and that the danger of walking over the same was known to both master and servant, then even though the master had agreed to remove the danger the servant must use such degree of care as is commensurate with the increased danger; and in fact must use a greater degree of care than he would in a case where he did not know of the danger.

Williams Cooperage Company v. Headrick, 159 Fed. 680.

Trudeau v. American Mill Co. 83 Pac. 725.

Considering now briefly the other Specifications of Error, and first, assignments number II and III, which are to the refusal of the court to give certain instructions requested by the defendant.

The first of these instructions was to the effect that if the jury found that the defendant had provided a safe way for the plaintiff to use in passing between the different floors, and that the plaintiff voluntarily chose a more dangerous way, and was injured while using this dangerous way that he could not recover, even though the master had agreed to provide another passageway for his use. This is the effect of the decision in Gowen v. Harley, *supra*, and expresses the rule of law as we understand it.

The second requested instruction was upon the question of assumption of risk and clearly states the law.

And the failure to give these two instructions was not cured by the court covering these questions in its oral charge.

Specification of Error Number V has particular reference to the use of an illustration by the court in its oral charge, in which the court stated to the jury that if one of them, being a farmer, gave to his employee an axe or pitchfork with a cracked handle, and the employee knowing nothing about the defect, uses the device and is injured, then the employer is responsible. We believe that this illustration and this portion of the charge to the jury was erroneous and misleading for the reason that it leaves out of consideration that element of knowledge which must be common to all sane people of ordinary understanding with reference to certain agents and instrumentalities, especially of such simple construction as an axe or a pitchfork, and that an employee cannot shut his eyes and go about his work, and then in case of injury claim that he did not know of the defect which should have been obvious to him. The illustration given by the court failed to call the jury's attention to the fact that in order to hold the farmer liable for an injury such as that supposed by the court that it would have to be shown that the farmer knew the tool was defective or had a latent danger or defect in it, which was not known to the servant, and which the servant had no reasonable means of ascertaining. And it seems inconceivable that a jury would not be misled by an illustration of this kind, where they were advised that for an injury occurring to the servant from the use of a simple axe or pitchfork which had a cracked handle the employer would be re-

sponsible; and this irrespective of the exercise of ordinary care on the part of the servant. This instruction, in the form given by the court in the illustration, certainly does not state the law.

An exception has also been saved, Specification number VI, to that portion of the court's oral charge which advised the jury in effect that the plaintiff could recover if the negligence of the defendant contributed to or caused the accident. We do not understand the law to be that where the negligence of the master, in connection with other facts, contributes to a servant's injury that the servant can recover. We understand the rule to be that the negligence of the master must have been the primary or proximate cause of the servant's injury in order for him to have a right to recovery.

We have heretofore in this brief suggested to this court that there was an entire lack of evidence in this case to show that the broken ladder between the second and third floors in the East manway was the proximate cause of the plaintiff's injury, and in a case where this question was directly raised, we think the instruction of the Court was entirely misleading.

In conclusion we would ask this court to bear in mind at all times in its consideration of this appeal that the plaintiff was not a young and inexperienced employee, whom it was the duty of the master to warn of any defects or dangers, but was an old, experienced miner,—experienced by his labors in other mines as well as in the defendant's. He was entirely familiar with his work, his

surroundings, and the ways provided by the master for him to use in going to and from his work. His knowledge of the place wherein he worked and of the ways provided for going to and from that work, was far superior to that of the master himself. He was one of the first men to ascertain the fact of a ladder being broken in the East manway and one of the first, if not the first, of the servants to find and use this plank in lieu of a ladder. He used it uncomplainingly for several days before his accident, and when finally a chance meeting with the shift boss, and the latter's reference to the difficulty in getting up to the fourth floor caused the plaintiff to himself remark of the inconvenient way which he had of going to and from his work, he did not even then complain of any danger which he anticipated in going to and from his work, nor ask or receive a promise from the master to remove any such anticipated danger; he merely suggested a more convenient way which might be provided by the master. Nor was there anything from which the jury could infer that the plaintiff anticipated any danger attendant upon his going to and from his work over this plank, nor that he intended to quit if the broken ladder was not replaced, nor that he continued to work relying on a promise to replace this ladder as the inducement for such continuance in the defendant's employ. We respectfully urge that in the light of all the evidence in this case the trial court should have directed a verdict in favor of the defendant.

Respectfully submitted,

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United States
Circuit Court of Appeals
For the Ninth Circuit

GOLD HUNTER MINING &
 SMELTING COMPANY,
 Plaintiff in Error.

v.

EDWARD JOHNSON,
 Defendant in Error.

At Law

Brief of Defendant in Error

Upon Writ of Error from the United States District Court
 for the District of Idaho.

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United States
Circuit Court of Appeals
For the Ninth Circuit

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v.
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STATEMENT OF FACTS.

This suit comes from the Northern Division of the District of Idaho.

The defendant in error, Johnson, sustained injuries while employed in the mines of plaintiff in error in Shoshone County, Idaho. Johnson recovered judgment and the mining company brings error. The case was tried upon an amended complaint.

The complaint charged in effect that on the 17th day of October, 1914, Johnson was in the employ of the mining company, as a machine man working on the 400 foot level on the night shift. Upon going to work in the afternoon he proceeded to the place where he had received instructions from the defendant to work. In op-

erating the machine drill which had been furnished by the defendant, plaintiff found that the drill was out of repair and it thereupon became his duty under instructions theretofore received, to disconnect the drill, carry it to the level, along the level to the shaft, thence to the main station in the mine and exchange it for another drill. (Par. IV. 20).

That the plaintiff was working in the westerly end of a stope on what was known as the 4th floor above the 400 level. Working near him was a mucker by the name of Holmi. The floors were numbered upward from the level, and in order to reach the shaft it was necessary to go down from one floor to the other to the level. That manways had been previously provided for reaching the floors above the level and ladders were installed for the use of the employees in going from floor to floor.

That in the stope where Johnson was working there were two manways, one of which extended from the 400 level in the westerly end of the stope upward to the third floor, and the other extended near the easterly end upward to the fourth floor.

That from the place where plaintiff was working it was impossible to reach the west manway on the several floors for the reasons: that the west manway did not extend to the 4th floor; that upon the 3rd floor it was not possible to pass from the east manway to the west manway because the floor between the two manways had been taken up leaving an opening into an ore chute which ex-

tended across the entire floor and between two sets of timbers, and moreover a slide chute reaching from the 4th floor to said opening effectively filled the width of the stope. That therefore, the only way to reach the level was downward in the easterly end of the stope and east of the chutes. That the stope on the several floors extended easterly from the manway and the face of the solid ground on the east was somewhat beyond the timbering on each of the floors.

The plaintiff, after taking down his machine, took it too the manway and down from the fourth floor to the third floor by the ladder. The ladder from the second to the third floor had been broken by a fall of rock a short time before the accident to the plaintiff, and at the time of the accident had not been repaired or replaced by the defendant and there was no means of going by the said manway from the third floor to the second floor and the only way by which Johnson could proceed to the second floor was by way of a plank or lagging eight inches in width which had been laid by the defendant from the floor at the easterly end over to the solid face of the stope and inclined downward from the floor toward the face. No guards, rope or other handhold whatever were provided.

Beneath the lagging or plank, the second floor had not been timbered out to the solid ground and there was an opening from the lagging or plank downward to the first floor or to the solid ground which constituted the face of the stope on the first floor.

The complaint then charged that the plaintiff having no other way provided by the defendant proceeded along the third floor to said lagging or plank and while walking on the same, and because of the negligence and carelessness of the defendant in providing such unsafe, inadequate way, plaintiff either slipped from the lagging or the lagging turned slightly throwing plaintiff off and downward approximately twenty feet to the first floor with his heavy steel drill falling on top of him and across his back, resulting in his serious injury. (Par. V. 20-23).

The complaint charged that the shift boss of the mining company in charge of the stope and of the plaintiff was Steve Shaw. That it was the duty of the plaintiff to perform such work at such place and in such manner as the shift boss directed. That the shift boss had under his charge other employes of the defendant, including timbermen, miners and muckers. One of the duties of the shift boss was to cause such repairs to be made as were necessary to keep and maintain the place where the employes were required to work in a reasonably safe condition and to make such reasonable inspections as were necessary.

That on the shift before that upon which the plaintiff was injured, plaintiff called the attention of the shift boss Shaw to the fact that the ladder in the east manway from the second floor to the third floor had been broken and that it was necessary to repair the same, and that the shift boss stated to the plaintiff that he would cause the

same to be repaired and replaced, and that it would be repaired and replaced and directed Johnson to use the way along which he was proceeding at the time of his injury until the said ladder was replaced and the manway repaired. That the plaintiff, relying upon the promise of the shift boss to repair the manway and to replace the ladder, continued in the employ of the defendant up to the time of his injury.

It was further charged that it was no part of the duty of the plaintiff to repair any such ladder or to replace the same and that the repair of the same would not have been within the scope of the plaintiff's employment or duties. (Par. VI; 23-24).

The complaint further charged that the defendant was negligent in providing such unsafe way; that it had full and express knowledge of the condition of said manway and of the way over which the plaintiff was required to go at the time of his injury, and that it had not provided him with a reasonably safe place in which to work, and to go to and from his work, and negligently permitted the said manway to become so out of repair as to be impassable. (Pars. VII, IX. 24-25).

Plaintiff was thirty-three years of age at the time of his injury, earning \$3.50 per day, and suffered severe and permanent injuries.

The answer admitted that plaintiff was injured at the place and in the manner alleged, and admitted the permanency and severity of his injuries as alleged. Ad-

mitted that Shaw, the shift boss, had the authority alleged in Paragraph VI of the complaint. It also admitted that it was no part of Johnson's duty to repair any ladder or to replace the same, and that such an act would be without the scope of his employment.

Affirmatively the mining company set up the defenses of contributory negligence, assumption of risk and negligence of a fellow servant.

THE PLAINTIFF'S CASE.

The plaintiff's case rested upon his testimony and that of the other employe, who was working on the fourth floor at the time of the accident, John Holmi.

Holmi testified concerning the accident substantially as follows:

Johnson on the night of the injury was working on the fourth floor, while Holmi was shoveling and mucking ore down the slide chute from the fourth to the third floor where it would fall into the open ore chute (50). The slide chute was extended from the post on one side of the floor to the post on the other side, and the top of the ore chute, which was on the third floor, was open (51). The ore chute he testified was open across the entire stope.

The manway in the west end of the stope extended up to the third floor; that in the manway in the east end the ladder between the second and third floors was broken the night of the accident (53).

Holmi testified that he worked in that stope four nights, the night of the accident being the fourth, and

that on the first night he worked there the ladder had been broken, but not so as to prevent him going up it. The next night it was more broken, but he came up over the ladder the first two nights; on the night that Johnson was injured it was all broken and it was impossible to use the ladder; it was broken all to pieces, a small piece of it was under the muck pile; there was a muck pile around it (54).

He testified that on the night of the accident he went to his place of work by going up to the second floor along the manway in the east end of the stope and over to the face and then by the lagging from the face to the third floor, thence by a ladder from the third to the fourth floor (55). He testified that in going from his place of work on the fourth floor down to the level that that was the best way; that to attempt to go to the other manway in the west end was very dangerous as a man might kill himself going over the chute (56).

He said that the chute extended from post to post, and that between the posts and the wall it was full of muck (57).

Johnson's machine was not working and he stated that he would take it down and exchange it. Johnson left with the machine and the next Holmi knew he heard him call and found him on the first floor lying down.

The place over which Johnson passed, extending from the third floor to the face of the stope, was not guarded in any way. He testified further that the first night he went to work on the fourth floor he went up the

manway in the east end and up the ladder, which was partially broken.

On cross examination, Holmi testified that the first two nights he went to work, he went up the east manway. That on the third night and the fourth night, he went by the plank extending from the face to the third floor. He said that either Johnson or the carman had told him of the plank. The manway in the east end he had seen the first night he went to work there; that you could go up those ladders to the third floor, but it was impossible to reach the east manway so as to climb up to the fourth floor because of the chutes. On one side between the posts and the wall there was no space and on the other side there was a little down near the bottom about eight inches wide. Holmi testified that the first night he went by that way he had to stoop and go sideways, but could get by.

After Johnson's injury his place was taken by a man by the name of George Ashland. That it was not possible for Ashland to have gone from the fourth floor to the third floor and then past the slide chute and timber slide to the manway in the west end and down that way. That after he quit work that night he and Ashland went down the same way they had come up, namely, by the plank in the east end.

The lagging referred to was three inches thick, eight inches wide, a six foot lagging, the upper end was set on a cap and the lower end on a ledge of rock against the end of the stope. There was two and a half to three feet

difference in elevation between the ends of the lagging, and there were no lights there except the miners' candles (63-71).

Holmi also testified that there was a timber slide, but that it did not extend to the fourth floor; it was also west of the chute. That the slide chute was the same width at the bottom as it was at the top, that is, that it was the same width on the floor of the third floor that it was at the roof thereof (105).

He testified that he had helped build the slide chute.

Johnson testified that he had worked at the Hunter off and on for several years; was working with Holmi on the night of his injury. He was working on the fourth floor of the 400 level and his immediate superior was Steve Shaw, the shift boss who looked after the men. That he went to work on the afternoon of his injury, barred down all the loose ground and started to drill when his machine began to leak in a joint, and not having any tools with which to repair it he took it down for the purpose of exchanging it. Such was his duty and the practice in the mine. He had also received orders to do so from the shift boss and foreman who had instructed him that every time a machine broke to take it down and get another one (74-76).

On the day he was injured, he went to his work by the ladders through the east end of the stope; went from the drift to the first floor and then up to the second floor on the ladders. That the ladder from the second to the third floor was broken; rocks had come down the manway

and had broken the ladder. From the second floor he went over to the face and walked upon the plank upward to the third floor and from the third floor to the fourth floor by ladder (77). On page 78, Johnson testified that the ladder had been partly broken the third night before he got hurt; that the muck had fallen around it, but held it up, but that the end was broken; and he could get up the ladder that night, but the night before he got hurt when he came on shift, the hole was blocked up; the ladder was broken and he had to go to the face and up the plank.

His shift boss, Steve Shaw, had been in the stope where Johnson was working the night before he was injured. Shaw had come up the same way because a slide chute was across the stope on the third floor. That Johnson could not get by that slide chute, it extended from post to post. That there was a little hole between the posts and the ground, but that had been all filled up with muck the night before he got hurt and he could not get by that way; he could see no chance to get by (79).

He testified that Shaw came up and said that a man could not get up there and asked Johnson how he got up. Johnson said it was pretty hard to get up there; that he had to go like a rabbit on the timbers, and that Shaw had better get a ladder. Shaw said that he would have the timbermen put in a ladder. That was the night before Johnson got hurt. Shaw also told him to go by way of the plank until the timbermen came up and put in the ladder, and that he would have the timbermen up there

as quickly as he could. That it was a part of the duty of the timbermen to put in the ladder and it was no part of Johnson's duty; he had nothing to do with that (80). Johnson testified that there were timbermen working on the night shift; he said that Shaw also stated that he had given orders for a ladder to be made and sent in. Shaw had charge of the timbermen (81).

Johnson also testified that running from the third floor down to the 400 foot level was a large ore chute from post to post down which the ore ran. On the top of that on the third floor there used to be a floor, but when they made the slide chute they had to open up the floor and then the rock broke in the rest of the floor and the whole floor was up there, and there was only about eight inches of floor left on the side and that was filled up with muck; that would be along the wall. The muck would go over the slide chute, there being only about an eight inch board on the side. He testified that the slide chute extended from post to post and the ore chute was open all the way across the drift, except a narrow plank on one side; on the other side it was broken to the wall; that was the hanging wall side. On the foot wall side, as the vein dipped some, there was a little space between the wall and the post at the floor, but on the hanging wall side it was all broken. He testified there was rock lying all around the ore chute. (82-83).

Concerning his injury Johnson testified that after he took his drill down he took it on his shoulder and went down the ladder from the fourth floor to the third floor;

he then walked along the third floor to the end, stepped onto the plank and then he did not know how it happened, but either the plank turned a little or his foot slipped; everything happened so quickly he could not tell which way it went there; he fell and for a time was unconscious (84-85). He called Holmi and was helped out of the mine.

On cross examination Johnson said he worked on the several floors in the stope in question; he said he was familiar with the manway in the west end of the stope, and that at the time of his injury it was provided with ladders to the third floor. At the time of his injury, the ladder which had been broken was in a manway. He testified that he had frequently gone up the west manway while he was working in the stope. That there was also a timber slide west of the ore chute behind the slide chute; that it only reached to the third floor and did not go up to the fourth floor; it was provided with a sort of hand-hoist (92).

He testified that he would take his drill up into the stope every time on his shoulder; he thought it weighed about 75 pounds.

There was a man known as a "nipper" there; he had already gone by at the time Johnson disconnected his machine. He only came around once or twice a shift. If he had been there just at the time Johnson needed some help, he would have helped to take the machine down, but to wait for him, he might have had to wait all night (95).

The night before he was injured was the first night

that he had ever walked over the plank to his work. He had been going up the ladder from the third floor before that; so long as he had the ladder, he went that way. He said he did not know whether the plank had been in that place before the ladder was broken; when the ladder was broken, he found the plank (95). He said the way he found out the plank was there, there was no chance to go the other way; he looked around, found the plank and went that way. It was in place from the ground to the cap at the time he first saw it. He did not know whether the upper end was nailed or not. He had gone over the plank a few times before he was injured. He had to go up and down it to get his steel. He said sometimes they have a ladder on the station and sometimes not. The ladder which had been broken was all broken up and they had to put in a new ladder; if they had the ladder at the hoist, it would not take very long to put it in. They did not have any ladder made at that time—at least, he could not see any ladder in the whole stope or at the station (98).

He testified that the slide chute had been built a few nights before his injury. The slide chute was of the same width at the top as at the bottom; it was not narrower at the bottom than it was at the top. He said he saw it on the third night before he got hurt and afterward; that he had looked over there to see if there was any chance to get through, but there was no chance to get through when the slide chute was there. He said he saw it the night before he was hurt and the third night before.

The foregoing constitutes in substance the plaintiff's case. It may fairly be stated that from that evidence it appeared:

(1) That on the evening of the 16th of October plaintiff, in going to his usual place of work found the ladder in the east manway between the second and third floors to have been broken down so that it was necessary to go another way to his work;

(2) He went to the east end of the second floor and found a plank extending from the ledge of rock onto the third floor, and he went up that plank to the third floor and thence by the manway to his place of work;

(3) That on that evening he complained to his superior, Steve Shaw, shift boss, and asked him to have a ladder put in the manway between the second and third floors; that Shaw promised him to have it done as soon as he could, and directed him to use the plank as a way until the ladder was put in. That Shaw had himself reached the point where Johnson was working by way of the plank;

(4) That there was no other way of getting to the fourth floor because the third floor was open at the ore chute, the planks either having been removed to permit the rock to be dumped down, or having been broken by the rock shoveled from the fourth floor; and for the further reason that a slide chute extended clear across the third floor, and it was impossible to reach the manway extending downward from the third floor in the westerly end of the drift.

(5) That the way provided, namely, by the plank, was an insecure, inadequate and unsafe way.

(6) That the mining company was negligent in maintaining such a way, and because of the promise and assurance of the shift boss that it would be remedied and the request that Johnson continue temporarily to use that way, the defense of assumed risk would not apply.

DEFENDANT'S CASE:

In this condition of the record the plaintiff in error presented its case, which was substantially as follows:

Certain maps were presented by a surveyor partially made up from actual survey and partially made from information furnished by the shift boss, Shaw.

Shaw testified that he was shift boss under whom Johnson was working on the night of his injury. That he had seen Johnson between a half hour and an hour before he was injured. At that time he was getting ready to drill on the fourth floor of the 400 stope. John Holmi was shoveling near him. On hearing of Johnson's injury, Shaw sent a man by the name of Ashland to take his place and went there himself and found the machine and John Holmi back at work. The machine was down on the second floor at the east end of the stope. He examined the place where Johnson was injured and found the plank from the cap over to the ground right at the east end extending from the third floor down to the end of the stope, not quite to the second (120).

He then testified that he had never seen the plank before that; had never been over it. That there was a

space extending from the end of the floor to the rock as it was their practice not to timber up until there was room to put in a full set, and the space east from the end of the floor was not sufficient for a full set (121).

He testified that he walked over the plank that night at the time he examined it in coming down after the accident. He went by the west manway up to the third floor, crossed over the third floor east to the plank and then down the plank to where the machine was. He walked by the ore chute. That the opening in the floor there was only about two or two and a half feet in width; between the ore chute and the wall in the bottom there was two feet and a half of space, at the top there was not so much—probably eighteen inches. There was no difficulty in getting through there. The slide chute goes in at the top of the ore chute on the third floor extending from the fourth floor and the men shoveled into the slide chute instead of throwing it down into the ore chute; it runs into the ore chute from the slide chute; the top of the slide chute was three feet or three feet and a half wide; at the bottom about two feet and a half (123), the bottom being about a foot narrower than the top. He then went down over the plank to the second floor (124). He testified the slide chute was made about two shifts before the accident.

He testified that the usual way of going from the level to the place where the plaintiff was working that night was up the west manway; they would go up on the

first floor from the second, thence to the third by ladders, then go east along the third floor past the timber slide. That was the course that the miners took in going to the place where Johnson and Holmi were working that night —up the west manway (125-27). Upon reaching the third floor they would go east to the manway to the ladder and then go up on the fourth floor to where he was working. He testifies that around the ore chute it was clean both before and after the accident. There was a ladder from the fourth to the third floor in the east manway; they were working east (128-129).

He denied having had the conversations with Johnson testified to by Johnson (130). On page 130, however, Shaw testified as follows:

Q. "State whether or not you were aware that he or any other workman under you were traveling up and down over this plank?

A. Why, they travel—I didn't know anything of this plank until after the accident.

Q. Then, at the time of the accident, or at the time you went on duty that night, were you aware of their going up and down that way?

A. I knowed they had went that way."

On cross examination, Shaw testified that he did not know that there was a broken ladder between the second and the third floors; he said there was no ladder there. On page 133, he testified that at the time of the accident there was a ladder lying against the bench at the east end from the second to the third floors, and he testified he supposed that they put it there to come up on the third floor. He admitted that he had charge of the stopes,

ladders and manways; that the ladder was not put there by his order, but it was there and had probably been there a day or two before the accident.

He further testified that he did not go over that way very often. Then immediately testified that he went over to the face of the east breast two or three times every night and had been doing so right along (134).

At page 135, he testified that the ore chute or rock chute extended across the vein from wall to wall and was six feet in length. He also testified that there was two feet on the side of the chute along which a man could pass (137). At page 138 he testified that it was impossible to get behind the post between that and the wall. He further testified that he had not given any instructions to the miners as to which way to get up to the third floor, either to Johnson or Holmi, and did not know which way they went.

He again impeached himself on pages 138 and 139 when he testified that there had been a ladder from the second to the third floor in the east manway; that it had been there before the accident; and then testified that it was there that night, but not in a good condition. He said it was partly covered at the top that night; the manway was partly covered, there was some rock and dirt over the top of the manway, directly contradicting the statement on page 132 that there was no ladder between the second and third floor. His counsel on page 142 attempted to rescue him from this contra-

diction on a very material question in the case, as follows:

"Q. Now will you point to the place where you stated to counsel the ladder was, that the top of it was covered by muck and rock?

A. That was this one here, from the first to the second.

Q. And that is the place that you had in mind when you referred to counsel—in answer to counsel's question?

A. Yes, sir.

Q. And is this the one that you said was partially—may have been broken, or—

A. Yes, was covered on top.

MR. GRAY: I object, if Your Honor please. He didn't say it was broken.

THE COURT: No, he said he didn't know whether it was broken or not, Judge Ailshie.

MR. AILSHIE: I didn't intend to—he said he didn't know, as I remember it."

On cross examination, he was asked if it were not a fact that in that mine it was customary to have at least two manways up into a stope, and he testified not always, and it was not their practice in that stope. In reply to a question by the court, he had to admit that it was the general practice in the mine, and then admitted that the men were accustomed to go through either one manway or the other unless they were instructed to the contrary. He had given no instructions not to use the east manway (145-6).

John Lamberton, the nipper on the shift upon which Johnson was injured, testified that on the night of the accident he went up to where Johnson was working; that he went by the east manway; knew of the existence of the plank and went that way. There was another way

by the west end passing by the chute on the third floor to the manway on the east end and up that manway to the fourth floor. He testified on page 150 that he did not go that way the night the accident occurred; he had passed that way at other times all right. He came down on that night the same way he had gone up—that is, by the east manway. That there was two feet of space on the foot wall side by the chute on which you could walk the night before the accident. On page 151, he said that along the side of the chute on this plank there was naturally a little dirt that dropped over the slide chute.

On cross examination he admitted that on one night he came up the west manway, came to the chute and called out and after the men called down to him he went back and around the other way. The reason he went around the other way was that he did not want to stop the men from throwing the rock down the chute; after he shouted to stop, there was no rock rolling down there then. He said the reason he did not go through then was that he preferred the other way, he guessed; that they had just opened the chute and it did not look very nice to go through there then (154).

Joe Pellecier testified that he could go between the west manway and walk by the chute. He testified on page 161 that he had gone over to the east end of the stope and by way of the lagging. George Ashland, a miner who replaced Johnson after his injury, testified that he got the machine on the first floor at the east end

and took the machine up that way. He saw there was another ladder there and went up, and after that he did not find more ladders. Went to the second floor on the ladder in the east manway; he then walked over to the bench and climbed up on the bench and up on the plank to the third floor, and then up the ladder to the fourth floor. When he came down he came down the east end (167). He said you could go by the slide chute and ore chute (168), but there was about a foot of muck on the floor beside the ore chute. He testified that there was plenty of room to walk on the side of the chute (170).

On cross examination, he testified that the slide chute was the same width at the bottom as it was at the top; it looked that way to him.

REBUTTAL.

In rebuttal, Johnson testified he had never told Holmi of the plank by which to get to the third floor. He also testified the shift boss, Shaw, was not up where he was working on the night of his injury prior thereto.

Holmi testified that Shaw was not there on the night of the injury, prior thereto.

A motion was made for a directed verdict and denied. The cause was submitted to the jury upon these controverted questions of fact, under instructions which the court will find are not only a correct exposition of the law, but entirely fair to the plaintiff in error, a verdict was rendered, judgment entered to review which judgment this writ of error has been allowed.

In the foregoing statement, the substance of all of

the testimony has been set out. This has been deemed advisable because of the many inaccuracies in the statement of facts in the brief of plaintiff in error. Throughout the brief of plaintiff in error there are statements concerning the facts in the case which are not justified, and which consist either of inferences which counsel draw from the testimony favorable to the plaintiff in error or a one-sided statement of controverted facts. To some of these statements we desire particularly to draw attention.

At the bottom of page 7 and top of page 8 of the brief of plaintiff in error is the statement that "Johnson had also walked on the third floor between the east and west manways and knew that there was sufficient room to pass the ore chute and had used this way in going to the fourth floor"—reference being made to page 97 of the record. The testimony referred to was simply to the effect that at times prior to the accident he had gone up the west manway to the third floor and thence over to the east manway and up the ladder. There is no suggestion, however, that it was after the ore chute had been opened up or the slide chute put in. The facts were that the slide chute had only been built on the night Holmi first worked in that stope, which was three nights before Johnson was hurt (107)

On page 79 Johnson describes the condition at the chutes on the night of his injury. He says:

"I couldn't get no other ways up, because the slide chute was across the stope on the third floor;

the ladder came up from the west end of the stope, but the slide chute was across the stope, and they couldn't get by that slide chute, because behind the slide chute was filled up with muck, the sides was filled up with muck. There was a little hole between the post—the posts was laying straight here (indicating), but there was a little hole down on the bottom of the posts, between the ground and this post, but that was all filled up with muck the night before I got hurt already, I couldn't get by that way no how. I don't see no chance to get by."

And on page 81, speaking of the ore chute, he said:

"The floor on the top there used to be, but now when they made that slide chute they have to open up the floors, and then the rock broke the floor more, and there was the whole floor up, and there was only about that much place on the sides, you know, and that was filled up with muck like this.

Q. You say, 'like this.' How much?

A. About eight inches.

Q. Eight inches on the side?

A. Yes."

So that the inferences sought to be drawn by the statement in the brief is not a fair one.

On page 8, it was also said that Holmi, the plaintiff's only witness, also knew of the west manway, and had used the same as a means of getting to the fourth floor, and in doing so had passed the ore chute and inclined chute on the third floor. Holmi, on page 66, testified that he never went by the west manway except on the first night he was working there, and it will be remembered that is the night he put in the slide chute and the night when the ore chute was opened. He said on the same page that he could have gone to the third floor by the west manway, but he could not have gone along that floor to the east manway. He said the only way he could

have gone would have been between the posts and the wall. On page 68, Holmi testified that the first night he went through the hole between the wall and the posts. He did not testify that it could be done thereafter, and Johnson testified that that was all filled up with muck.

On page 8 it is also said that the plaintiff knew of the existence of the windlass in the timber slide as a means of hoisting etc. That is true, but this timber slide and windlass that are spoken of were west of the rock chute and inclined chute, so that if the plaintiff's testimony and that of Holmi was to be believed it was impossible for him to reach that timber slide.

It is said at the bottom of page 8 and the top of page 9 that Holmi did not testify that it was impossible to go by way of the ore chute and slide chute, but that he didn't think a man carrying a drill could get by the ore chute and inclined chute on the third floor. Reference is made to page 56. What he actually testified to concerning this matter is as follows:

"Q. Mr. Holmi, in going from your place of work up here on the fourth floor down to the level on that night, was there any other way that you could go?

A. No, that was the best way, anyhow.

Q. How about this other manway, could you go that way?

A. That was so dangerous he might kill himself going over the chute there."

On page 9 it is said that it was Johnson who told Holmi of the existence of the plank extending from the third floor to the face. Reference is made to page 65 of

the record. What Holmi testified to was that he didn't know whether it was Johnson or Pellichier who told him. On page 173 Johnson testifies that if was not he who told Holmi of the way by the plank.

On page 10 it is said that it is shown that the ladder which had been broken was not as a matter of fact a part of any manway, and it is said that the plaintiff says he did not know whether the broken ladder was a part of the regular manway or not. Reference is made to page 90. We quote his testimony concerning that to show that the inference which is sought to be drawn is not a correct one. He testifies at pages 90-91 as follows:

"Q. And you were familiar with the manway in the west end of the stope, weren't you?

A. I don't understand.

Q. You know there was a manway?

A. Oh, you, I knew that.

Q. And at the time of your injuries that manway was complete to the third floor, and provided with ladders, wasn't it?

A. Yes, to the third floor.

Q. Now, the ladder which you say was broken was not in a manway was it?

A. It was there in the manway, but he was broken; the man-hole was there and the ladder was there, but he was broken.

Q. Isn't it a fact, Mr. Johnson, that the ladder which became broken was one which had been taken from the west manway and brought down to this second floor, and just put from floor to floor, but not in a manway?

A. I don't know that.

On page 18 of the brief it is said that Johnson told his fellow workman of the existence of this plank. We

have heretofore referred to the fact that such is an incorrect statement of the record.

On page 29 it is said, referring to the plaintiff:

"He had known of this broken ladder and of the use of this plank for several days and had made no complaint, and had not even notified the master of this condition."

The evidence of both Johnson and Holmi uncontradicted is that the ladder from the third to the fourth floor had been used up to the night before Johnson's injury, and that was the first night Johnson had used it and was the night he spoke to Shaw concerning the placing of a new ladder in the manway, and he thereafter used it because of Shaw's directions to him.

Again at the bottom of page 29 and the top of page 30 it is said: "In the present case the servant had worked several days under identically the same conditions and without complaint." On page 39 it is said:

"The plaintiff in his testimony (97-98) testified that the ladders were stock ladders of the uniform length of ten feet and were kept on the level of the mine ready to be taken to whatever point they were required, and that sometimes they were even kept in stock on different stations; he testifies that it would only take a few minutes to bring one of the ladders from whatever point they were kept in stock to the place where this ladder was to be put in the east manway."

This is another unfair and incorrect statement of the record. It is best to quote the record for the purpose of seeing what he did testify to:

"Q. Now, these ladders, Mr. Johnson, that they used there, they are all the same length, aren't they?

A. Yes, about the same length, I guess.

Q. What are they, ten foot ladders?

A. I don't know about that.

Q. And they keep those ladders down on the level ready to take to any portion of the mine and use don't they?

A. Sometimes they have a ladder on the station and sometimes not.

Q. Now, this broken ladder was in such condition that it couldn't be repaired, as I understand you, was it?

A. I don't know. I don't understand what repair means.

Q. This ladder between the second and third floor was all broken, was so broken that it couldn't be repaired, couldn't be fixed.

A. Yes, it was all broken up.

Q. They had to put in a new ladder?

A. Yes.

Q. How long would you say it would take them to get that new ladder and hoist up there and put it in place?

A. Well, if they had the ladder on the hoist it wouldn't take very long.

Q. Just a few minutes, a matter of a few minutes?

A. Yes.

Q. They had the ladders there ready, made, ready to use?

A. No. At that time there wasn't no ladder on the whole place there. I couldn't see no ladder on place.

Q. By the whole place, what do you mean?

A. The whole stope. And not any on the station, either.

Q. How long was this stope?

A. I don't know how long it was.

Q. Between sixty and fifty feet, wasn't it?

A. Oh, I guess it was.

Q. And the cage went up right at the east end of the stope, didn't it? The cage in the shaft was within a few feet of the east end of this stope?

A. Yes, I think it was part of the shaft from the east end of the stope.

Q. And they had ladders on other floors, didn't they, ready to use?

A. I don't know that—not on the floors, but they may be had other ladders, I don't know that because I was working on that level." (97 to 99).

It will also be noticed that on page 81 Johnson testifies that Shaw told him the night before that he had given the foreman orders the day before to send in a ladder, to make a ladder and send it in. So that if any inference is to be drawn it is that there were no ladders whatever ready.

On page 45 it is said that Johnson selected the most dangerous way there was, namely, the plank, whereas, the other manway was available and he might have sent his drill down the timber slide. Of course, that was one of the controverted questions of fact in the case. His testimony and that of Holmi, if to be believed, was that he could not get to the timber slide and that to attempt it was a much more dangerous way than the one he went.

On page 46 it is said:

"It was the proof of this fact, i. e. that the shift boss, Shaw, even admitting plaintiff's testimony as to his conversation with Shaw to be true, had promised merely to replace a ladder in the east manway, while the plaintiff's injury was due to the use of a plank, *the very existence of which was unknown to the master*, and which was located many feet away from this broken ladder, that caused the trial court to hesitate as to whether or not he would send this case to the jury."

This is an incorrect statement. Shaw did know of the existence of the plank, for Shaw had been using it himself. On page 79 Johnson testifies that Shaw came

up that way the night he was injured. On page 80, Johnson testifies that Shaw told him to go by way of the plank until the timbermen came and put in a ladder. The answer admitted that portion of paragraph VI of the amended complaint which set forth the duties of the shift boss, and which alleged that he had charge of said stope and of the timbermen, and that one of his duties was to cause such repairs to be made as were necessary to keep and maintain the place where the employes of the defendant were required to work in a reasonably safe condition, and to make such inspections as were necessary in the performance of the business of the defendant. So that so far as the facts set forth in the above quotation of the brief of the plaintiff in error are concerned they are inaccurate.

It is then said that it was these things that caused the trial court to hesitate as to whether or not he should send this case to the jury, reference being made to page 178. That is based upon the statement apparently contained on that page, which is as follows:

“THE COURT: I think that perhaps while the case is without any precise precedent, I shall have to take the view that it is one for the jury. Therefore the motion will be denied.”

Certain arguments of counsel and remarks by the court are not in the record and there is nothing to justify the statement that the court hesitated in sending the case to the jury. His statement had reference solely to the argument advanced at the time of the motion, namely, that Johnson was not using the particular way which

the master had promised to repair, but was using the temporary way provided in lieu thereof.

On page 47 it is said:

"But the plaintiff himself in his testimony (179) did not say positively that either the ore chute or whatever muck may have been near the same would have prevented him from going to the west manway on the night of the accident. Plaintiff merely makes the general statement that 'there was no chance to get by.'" (79)

That is not an accurate statement of his testimony at page 79 and the court is invited to inspect the testimony.

On page 48 it is said that Holmi testified that by stooping or bending slightly there was no difficulty in using the passage way between the slide chute and the wall (68). That is also a misstatement of Holmi's testimony. Holmi testified that on the first night he worked there he could get through that hole. He did not say that he could easily get by or that there was no difficulty in getting by. On page 66 he says that on the night Johnson was hurt he could have gone up the west manway to the third floor, but he could not have walked on the third floor past the slide chute to the ladder.

On page 48 it is further said, "It is shown that he could have used the timber slide which is provided with a windlass." That was a controverted fact for plaintiff and Holmi both testified that he could not get to it.

We have specifically pointed out these inaccuracies and misstatements because we do not desire that they go unchallenged and for the further reason that it most clearly shows a clear conflict in the testimony. If all the

things claimed by the plaintiff in error had been believed by the jury and all of the things testified to by the plaintiff and Holmi had been disbelieved, a different verdict would have been rendered. The verdict, however, shows that these several contentions concerning the facts were found in favor of the plaintiff.

ARGUMENT:

The assignments of error are six in number. The first is directed to the action of the court in denying the motion for a directed verdict.

The second and third are to the action of the court in refusing certain requested instructions.

The fourth, fifth and sixth are directed to certain portions of the charge of the court to the jury.

ASSIGNMENT NO. 1:

The statement of the evidence and the examination thereof will convince the court that the case was clearly one for a jury. The evidence was in sharp conflict upon a number of the material issues. It was not denied that the plaintiff was injured as claimed. It was not denied that his injuries were permanent and severe as claimed. It was not denied that it was the duty of the shift boss, Shaw, to inspect the places where the plaintiff was working and the entries thereto, to cause to be made such repairs as were necessary to keep such places reasonably safe, that it was plaintiff's duty to work at such place and in such manner as Shaw directed that it was no part of plaintiff's duty to repair or replace broken ladders in

the manways, but the duty of Shaw, to cause the timbermen to do so.

Upon all of the other questions there was a sharp conflict, namely:

(1) The plaintiff testified he had complained to the shift boss, Shaw, of the way by which he was required to go to his work, and had requested Shaw to have a ladder put in, and that Shaw promised to have a ladder put in and had instructed the plaintiff to use that way until he would have the timbermen put up a ladder, and that such conversation was on the night preceding the accident. Shaw denied this conversation.

(2) Both Johnson and Holmi testified that the ladder in the east manway between the second and third floor was broken down the night of the accident, and it was impossible to use the manway. Shaw testified that there was no ladder there and that there was not a broken ladder, though he subsequently said that there was a ladder there and that it had been covered up in the upper portion by the muck, and Johnson testified that Shaw had used and had directed him to use it (79-80).

(3) Shaw testified he did not know of the presence of this plank at the east end of the stope extending from the bench up to the third floor. Johnson and Holmi both testified that they had used it for two nights before. The nipper, Lamberton, testified that two nights before he went over the plank and that on some other night previously he had gone that way (154). Shaw testified that he did not know that there was a plank there, although

he testified that he had been over a couple of times each shift to the east face, but he did let it slip out on page 130 that he knew the men were going that way. So that there was a sharp conflict of testimony as to whether or not Shaw knew of the way, had instructed Johnson to use it and knew of the plank.

(4) The defendant contended that there was a safe way by walking along the third floor from the top of the west manway on that floor by the timber slide, the slide chute and ore chute, to the ladder extending from the third floor upward to the fourth floor in the east manway.

The defendant's witnesses testified that they went that way on the night in question after the accident and that there was plenty of room to walk along the foot wall side.

The plaintiff's witnesses, both Holmi and Johnson, testified that the slide chute extended clear across the floor and that in addition to that, the entire floor was open over the ore chute from one wall to within eight inches of the other wall and the eight inches of plank on that wall were covered with rock and muck, and that that opening was approximately six feet long and the width of the floor, except that eight inches.

If their testimony was to be believed, it was obviously a more dangerous way and the court submitted the question to the jury under specific instructions.

(5) It was earnestly urged that the plaintiff assumed the risk but the court held that was a question for

the manways, but the duty of Shaw, to cause the timbermen to do so.

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If their testimony was to be believed, it was obviously a more dangerous way and the court submitted the question to the jury under specific instructions.

(5) It was earnestly urged that the plaintiff assumed the risk but the court held that was a question for

the jury, and certainly under the evidence, promise to repair and the instructions to use that way temporarily until the ladder was put in, it became and was a question for the jury.

NEGLIGENCE OF PLAINTIFF:

It is elementary that the duty of the mining company was to use reasonable precautions to keep the entries and passageways which it was necessary for its employes to use in going to and returning from labor reasonably safe.

Buzzell v. Laconia Mfg. Co.
(Me.) 77 Am. Dec. 212.

Lavin v. Jones (Mass.) 95 N. E. 219.

"Where a servant, acting in the line of his duty, walks from one part of the building to another over a walk provided by the master for that purpose, the law regards the walk as a place furnished by defendant for his servant to work in."

Kirby v. Montgomery Bros. & Co.
(N. Y.) 90 N. E. 52.

It was not and is not seriously contended by the defendant that the plank furnished Johnson constituted a safe way.

Upon the question of its negligence the mining company relied upon an attempt to establish that there was a reasonably safe way, namely, by way of the third floor from the west manway to the east manway. The testimony upon this subject was as contradictory and conflicting as could well be imagined. That conflict has heretofore been pointed out and was particularly pointed out by the trial court in his instructions where he said:

"In this connection it is proper that I direct your attention to the fact that there is evidence tending to show that there was another way of reaching the place and coming from the place where the plaintiff was at work. There is a conflict of evidence upon that point, but there is evidence tending to show that there was such a way, and evidence to rebut it. The defendant contends that this other way was a safe one, that is, the way going by the rock chute or slide. If you find that it was a reasonably safe way, and that plaintiff knew of its existence, and, instead, of using it, for his own convenience he carelessly used the more dangerous way, then he could not recover, for, as you will see, his injuries would upon that assumption be the result of his own carelessness in taking a dangerous way, when one reasonably safe was open for his use."

THE DEFENSE OF ASSUMED RISK.

It is most earnestly urged on the part of the mining company that the plaintiff assumed the risk. The doctrine of assumed risk does not apply, because Johnson had complained of this particular defect; a promise to repair had been made, and he had been expressly instructed to use the way by the plank until the repair had been made. It is not questioned that the shift boss, Shaw, had the authority to make the promise to him and the authority to make such repair and the authority to instruct him and in view of the verdict of the jury upon the controverted questions, it must be assumed that Shaw did so instruct Johnson and made the promise to which Johnson testified, and instructed him to go by way of the plank until Shaw could have the manway repaired.

The facts of this case bring it squarely within the rule announced in

Hough v. Texas & Pac. R. Co., 100 U. S. 213.
Southwestern Brewery v. Schmidt, 226 U. S. 162.
In the case of
Hough v. Texas & Pac. R. Co.

the Supreme Court said:

"If the servant, having knowledge of a defect in machinery, gives notice thereof to the proper officer, and is promised that such defect shall be remedied, his subsequent use of the machinery, in the belief, well grounded, that it will be put in proper condition within a reasonable time, does not, necessarily, or as a matter of law, make him guilty of contributory negligence. It is for the jury to say whether he was in the exercise of due care, in relying upon such promise, and in using the machinery, after knowledge of its defective or insufficient condition. The burden of proof, in such a case, is upon the company to show contributory negligence."

In

Southwestern Brewery v. Schmidt,

the Supreme Court said:

"Whatever the difficulties may be with the theory of the exception (1 Labatt, Mast. & S. chap. 22, sec. 423), it is the well settled law that for a certain time a master may remain liable for a failure to use reasonable care in furnishing a safe place in which to work, notwithstanding the servant's appreciation of the danger, if he induces the servant to keep on by a promise that the source of trouble shall be removed."

The language cited is directly in point. The declaration there alleged that it was the plaintiff's duty to cook brewers' mash in a cooker; that the cooker was out of repair; that the plaintiff was unwilling to use it, but that the defendant requested him to go on until it could be repaired and promised that it should be within a very short time; that the plaintiff did go on, relying upon the

promise; that the cooker gave away and the plaintiff was badly scalded.

The principle upon which this exception to the doctrine of assumed risk is based is that the master's promise to repair or make safe the place where the servant is working, or the machinery with which he is working, complained of by the servant, creates a new relation under which the master impliedly agrees that the servant will not be held to have assumed the risk for a reasonable time following the promise. In other words, that the risk of the defect is cast upon the master.

Hough v. Texas & Pac. Ry. Co. 100 U. S. 213.

Utah Consol. Mining Co. v. Paxton, 150 Fed. 114.

Crosby v. Cuba Ry. Co., 158 Fed. 144.

Alkire v. Myers Lbr. Co. (Wash.) 106 Pac. 915.

Lamoon v. Smith Cement Brick Co. (Wash.) 132
Pac. 880.

Rothenberger v. Northwestern Consol. Mill. Co.
(Minn.) 59 N. W. 531.

In

Cudahy Packing Co. v. Skoumal, 125 Fed. 470.

the Circuit Court of Appeals for the Eighth Circuit says:

"As before remarked, we are unable to discover any material error in these excerpts from the charge, since the law is well settled that when a defect in a tool or an instrument is called to the master's attention by his servant, and he directs or requests the servant to continue to use it in its defective condition for the time being, promising to have it soon repaired, or to supply a better implement, the servant, by complying with such an order or request, cannot be regarded as having assumed the risk of getting hurt, unless the risk is so great and imminent that a person of ordinary prudence would not have continued to use the defective tool, although he was requested or ordered to do so. It would be little

short of absurd to hold that a servant voluntarily agreed to assume the risk of being injured by the use of a defective implement or appliance, and to absolve the master from liability therefor, when it appears that he complained to the master of the defect, and the master admitted that the complaint was well founded, but induced the servant to continue using the defective tool or appliance by promising to repair it within a reasonably short space of time, or to supply a better. That a servant will not be held to have assumed the risk of injury incident to working with a defective implement of any sort, under circumstances last stated is well settled."

In

Crosby v. Cuba R. Co., 158 Fed. 144

On pages 150 and 151 it is said:

"Ordinarily a servant assumes the risks of danger which are obvious to him because of an implied agreement between him and his master. But if those obvious risks are due to defective machinery, and he complains of the defect to his master, and the master promises to have the defect remedied, and requests him to continue with his work, the implication is that until the promise is executed, or until the time within which it should be executed has expired, the master assumes the risks, unless, indeed, as above stated, the peril is so grave and imminent that the servant cannot continue his work without being guilty of contributory negligence."

In

Utah Consol. Mining Co. v. Paxton,
150 Fed. 114,

The Circuit Court of Appeals for the Eighth Circuit held:

"There is an exception to the rule that a servant assumes the ordinary risks and dangers of his employment, to the effect that, where a servant makes complaint to his master of a dangerous defect in his place of work or in the appliances furnished him, and the master promises to remedy it, the risk of that defect is cast upon the master, and the servant is relieved from it for a reasonable time to enable

the employer to remove it, unless the danger from it is so imminent that a person of ordinary prudence would not continue in the employment after the discovery of the condition."

The state cases are to the same effect. In
Alkire v. Myers Lbr. Co. (Wash.)
 106 Pac. 915

it is held:

"An employer's promise to repair defective appliances is in effect an agreement to temporarily assume responsibility for any accident occurring by reason thereof, and the servant does not assume the risk of injury from such defect until the lapse of such time as precludes reasonable expectation that the promise will be performed."

In the still later case of

Lamoon v. Smith Cement Brick Co. (Wash.)
 132 Pac. 880

the court on page 883 says:

"We are committed to the rule that in such a case 'the risk of the defect is cast upon the master until such time as would preclude all reasonable expectation that the promise might be kept unless the danger from the defect is so imminent that no person of ordinary prudence would risk injury from it.' "

and in support of its doctrine cites numerous Washington cases and the case of

Hough v. Railway Co. 100 U. S. 213

No construction can be placed upon the case of Hough against the railway company other than that the Supreme Court adopted the principle there that the risk of the defect is cast upon the master for a reasonable time after the complaint is made, for the court quotes from Cooley on Torts the following:

"Moreover, the assurance removed all ground for the argument that the servant by continuing the employment engages to assume the risk."

In

Rothenberger v. Northwestern Con. Mill. Co.
(Minn.) 59 N. W. 531.

the Supreme Court of Minnesota holds as follows:

"According to the best-considered cases, the real question to be determined is whether, under all the circumstances, as they appear in each case, the master had a right to believe, and did believe, that the servant intended to waive his objection to the defect of which he has complained. This is a question of fact, not of law, and consequently for the jury, at least if not entirely free from doubt. There can be no question that, when a master has expressly promised to repair or remedy a defect, the servant can recover for an injury caused thereby within such a period of time after the promise as would be reasonably allowed for its performance, or within any period which would not preclude all reasonable expectation that the promise might be kept. Hough v. Railway Co., 100 U. S. 213; 1 Shear & R. Neg. sec. 215, and cases cited."

THE COMPLAINT OF THE SERVANT WAS SUFFICIENT AND THE PROMISE TO REPAIR SUFFICIENT TO RELIEVE THE SERVANT:

The mining company seeks to avoid the rule that the complaint of the servant and promise to repair and direction to continue to use the way charged the master with the assumption of risk and relieved the servant upon the usual grounds, namely, that the complaint of the servant was insufficient because it did not in technical language declare that he regarded the condition as dangerous and proposed to quit if the danger was not removed; that the promise of the shift boss was insufficient; that the plaintiff was not induced to remain in the employ by reason of the promise and that a reasonable time after

the promise had been made had expired prior to the injury.

Labatt on Master & Servant, 2d Ed. Sec. 1345 states the principle with reference to the complaint and the promise as follows:

"When complaining of defective instrumentalities or machinery it is not necessary that the servant shall state in exact words that he apprehends danger to himself by reason of the defects, nor need there be a formal notification that he will leave the service unless the defects be repaired or remedied. It is sufficient if, from the circumstances of the case, it can be fairly inferred that the servant is complaining on his own account, and that he was induced to continue in the service by reason of the promise.

It is ordinarily for the jury to say whether the servant's reliance on a promise by the master induced him to continue work."

In

Highland Boy Gold Min. Co. v. Pouch,
124 Fed. 148

the Circuit Court of Appeals for the Eighth Circuit holds:

"It is finally assigned as error that the trial judge instructed the jury, in substance, that if the plaintiff called the attention of the shift boss to the fact that some of the posts were taking weight, and the shift boss promised to remedy the defect, and the plaintiff continued to work because of this promise, then he could not be said to have assumed the risk resulting from the particular defect which he had pointed out. It is urged that this instruction ought not to have been given, because there was no evidence that the plaintiff did continue to work because the shift boss promised to remedy certain defects in the timbering that were called to his attention. This contention on the part of the plaintiff in error is not supported by the testimony. There was testimony tending to show that the shift boss not

only promised to erect additional supports when his attention was called to the fact that certain posts in one part of the stope were taking weight, but that he also assured the plaintiff that it was perfectly safe for him to remain where he was. *It is a fair inference, from the testimony on this point, that these assurances had weight with the plaintiff and induced him to continue at work until the collapse occurred. We think, therefore, that this exception to the charge is without merit.*" (The Italics are ours).

In that particular case the plaintiff called the attention of the shift boss to the fact that the timbers under certain ground were taking weight, and the shift boss assured him that he would have that fixed, and further that it was perfectly safe for him to remain where he was. The only difference in that case and this one is that in this case the shift boss told the plaintiff that he would have the manway fixed and that in the meantime Johnson should use the plank in going to and from his work. The principle is identical.

In

Hermanek v. Chicago & N. W. Ry. Co.

186 Fed. 142

the Circuit Court of Appeals for the Eighth Circuit said:

"The evidence discloses that the plaintiff, on one or two occasions before the injury in question, complained to Barry, the foreman, of the worn and defective condition of the bars in question, and that they were dangerous to use; Barry stating in response thereto that he would fix them or send them to Clinton to be fixed. Whether the evidence in this regard shows a specific promise upon the part of Barry to procure new or repaired bars, that plaintiff so understood Barry's promise, and relied upon the same, is not altogether clear; but the evidence in this respect is of such a character that it should have

been submitted to the jury to say whether or not Barry's statements to plaintiff were intended by Barry, and understood by plaintiff, to be a promise that new or repaired tools would be furnished and whether plaintiff continued to work with the tools, relying upon such promise. The law is that an employe does not assume the risk by continuing to work a reasonable length of time with worn and defective tools, after having notified the employer, or the foreman, standing in the place of the employer, of the worn and defective condition of the tools, and obtained from the employer, or foreman, standing in his place, a promise that new ones or repaired ones would be obtained and furnished."

In

Thorpe v. Missouri Pac. Ry. Co. (Mo.) 2 S. W. 3
it is said:

"The dependent position of servants generally makes it reasonable to hold any notice on their part sufficient, however timid and hesitating, so long as it plainly conveys to the master the idea that a defect exists, and that they desire its removal; that the real question to be determined in each case is whether, under all the circumstances, the master had a right to believe, and did believe, that the servant intended to waive his objections to the unfitness of his fellow servant, or the defect in the materials provided for the work."

In

Myhra v. Chicago, M. & P. S. Ry. Co. (Wash.)
112 Pac. 939

it was contended that the complaint was not sufficient; the promise not sufficient, and that the employe did not continue to work in reliance thereon. The court held that they were questions of fact rather than of law and consequently for the jury, if not entirely free from doubt.

In that particular case, the defect complained of was

upon a car. The car had been in use for three or four weeks and the respondent, a brakeman, was familiar with its defects. A short time before the accident the servant had in a conversation with the terminal engineer of the railroad suggested to him that boards should be removed from the side doors so that they could be opened and signals given from there, also for the purpose of permitting them to get out, the car which was in use being one where the ends only were open; that the terminal engineer replied that the use of the car was only temporary, "but that 'we will hold out the first box car,' or that 'we (meaning the crew) could hold out the first small box car—if we saw any small box car come to the coast—hold it out and they would fix it up for a ca-boose.' " And further, "'We will fix it up.' " On cross examination, the witness further said that Osgood, the conductor, and himself were in the car when the conversation took place, and they were talking 'about how the car was there and such like.' The court said with reference to the conversation:

"The conversation occurred in the car between two men experienced in railroading. They both knew that the car had neither platform or brakes. Osgood knew that the brakeman was the signal man, and that the giving of signals from either end of the car when the car was in motion was dangerous. When the respondent said to him that the removal of the boards and the opening of the door 'would give us a chance to stay there and give signals and also to get out if it was necessary,' he knew that the complaint had reference to the hazard incurred by the brakeman in giving signals. The complaint was made on behalf of himself and the other brakeman.

It is said that he did not point out the particular peril to be avoided. The jury, however, was warranted in inferring that this was known to Osgood. They were talking about a car the defects of which were well known to them. The jury had a right to infer that the conversation was not altogether without purpose. That which may be reasonably inferred from a fact stated is as legitimate evidence as the statement itself."

It is urged by the plaintiff in error that the conversation related by Johnson wherein the shift boss promised to remedy the defect was opened by the shiftboss. It is further urged that the use of the ladder in the manway was a mere convenience. The argument hardly needs reply. The court must be convinced that the servant, on the first occasion after the manway became impassable, complained to the shift boss concerning the condition. It must be assumed it was for his own benefit and that he might go by the usual way rather than walk a narrow eight inch plank. It is not reasonable to believe that he would have remained in the employ of the defendant had he been required to go to and from his work along such footways. However, those were all questions for the jury and have been determined in favor of Johnson.

It is urged in the brief of plaintiff in error that Johnson was not induced to remain in defendant's employ by the promise to make the place safe, but the jury found that he was.

It is urged that he did not testify expressly that it was such promise that induced him to remain. We respectfully suggest that the self-serving declarations of a

servant that he remained in the employ because of such promise would not add materially to the weight of the testimony. The conclusion is one which the jury draws from all of the facts.

There must have been some purpose in Johnson's complaining to the shift boss. It was not a mere idle conversation, and we submit that the master assumed the risk of Johnson going by the plank according to his orders for a reasonable time after the promise was made.

A REASONABLE TIME AFTER THE PROMISE HAD NOT ELAPSED.

It is urged that the plaintiff continued to work after the expiration of a reasonable time within which to repair. It may be stated as a general proposition that the question of what is a reasonable time under the circumstances is for the jury. In the case of

Acme Harvesting Co. v. Atkinson, 208 Fed. 244, it is said:

"The authorities almost uniformly sustain the proposition that a person may rely upon a promise to repair without being guilty of contributory negligence, and that the question of reasonable time is one of fact for the jury. Here the jury have found for the plaintiff on that point, and we find nothing in the evidence to show that such finding was not based on and justified by the facts appearing of record."

In

Odell v. Mfg. Co. v. Tibbetts, 212 Fed. 652, it was held:

"That this is one of the class of cases where, in the federal practice, the determination of what is a reasonable time is ordinarily for the jury cannot

be disputed; and if the defendant had desired more specific instructions, or to bring to the attention of the court or jury the question which it now seeks to bring to our attention, it should have been more specific; and so this general exception to two pages of a charge substantially correct cannot be availed of."

In the case at bar on the first shift after the manway became impassable, he complained to the shift boss about it and said he should get a ladder there. The shift boss promised him that he would do so; stated he had already ordered a ladder and would have the timbermen put it in, and for Johnson to use the way by the plank until it was put in.

The shift boss further told him he would get the timbermen there as quickly as he could and the only inference to be drawn from the record is that there were no ladders in the mine for Shaw told Johnson he would give orders to have a ladder made and sent in. Johnson was injured on the succeeding shift.

As a matter of law, the court certainly could not say that that was an unreasonable time under all of the circumstances.

It is urged that the promise to repair does not relieve the servant of the assumption of risks incidental to instrumentalities of simple construction. Here the servant was not using any tool or instrumentality of simple construction which caused his injury. He was engaged in working a machine drill. His complaint had to do with the entry by which he reached his place of work, and with the safety of his place of work, and it was no part

of his duty to repair or keep such entry safe. In

Highland Boy Gold Min. Co. v. Pouch, 124 Fed. 148 the putting of props in a mine was not a complex matter any more than repairing the entry in this case. The doctrine of promise to repair or make safe applies to the place of work as well as to the instrumentalities with which a servant is working.

In

Narramore v. Cleveland etc., R. Co., 96 Fed. 298, Judge Taft said:

"It makes logical that most frequent exception to the application of doctrine by which the employe who notifies his master of a defect in the machinery or *place of work*, and remains in the service on a promise of repair, has a right of action if injury results from the defect while he is waiting for the repair of the defect, and has reasonable ground to expect it."

It will be noticed that the court refers the doctrine of the promise to repair not alone to a particular piece of machinery with which the servant is working, but to the place of work.

Lamoon v. Smith Cement Brick Co., (Wash.)
132 Pac. 880.

This last case had to do with a runway on which the plaintiff was wheeling concrete. The rule was applied to a place of work in

Brown Cracker Co. v. Johnson, 154 S. W. 684.

where it was claimed that the master was negligent in furnishing an illy-lighted place of work. Complaint had been made and promise to provide better lights given.

The same is true of a defective foot-board on an engine.

Berglund v. Ill. Cent. R. Co. (Minn.) 123 N. W. 928.

Moreover, the claim that the principle does not apply to simple tools is disputed by the highest and perhaps by the weight of authority, at least in the Federal Courts. In

Hermanek v. Chicago & N. W. Ry. Co., 186 Fed. 142 the Circuit Court of Appeals for the Eighth Circuit applied the doctrine to a claw-bar, and said:

"No sound reason exists for a different rule being applied to a simple tool than to a complex one, when the defective and dangerous character has been called to the master's attention by the servant, and a promise made by the master that the defect would be remedied or a new tool furnished."

In

Shea v. Seattle Lbr. Co. (Wash.) 91 Pac. 623 the tool complained of was a wooden stick used to clean a chute in a sawmill, whereas, it was claimed an iron rod should have been provided. In

Dudley v. R. P. Hazzard Co. (Me.) 92 Atl. 517, the doctrine was applied to a defective jointed pole used to clean a chute in a factory for lowering certain wooden-ware.

CONTRIBUTORY NEGLIGENCE.

It is finally urged that plaintiff was guilty of contributory negligence. The argument is that there was another way, namely, by the west manway. However, that was one of the controverted questions of fact in the case submitted to the jury under express instructions.

The evidence here is that all of the men working or having occasion to go to the fourth floor of the stope in question on the night of the injury and the night before had gone by way of the plank, and the testimony of both Johnson and Holmi is that the shift boss, Steve Shaw, went that way. The testimony of Johnson is that Steve Shaw directed him to go that way.

It certainly could not be contended, as a matter of law, therefore, that the danger was so great or imminent that a person of ordinary prudence would not use that, the only way. So that we respectfully submit that the court committed no error whatever in submitting the negligence of the mining company and the questoins of contributory negligenee and assumption of risk to the jury.

ASSIGNMENT OF ERROR NO. 2.

The requested instruction No. 1, the refusal to give whichh is assigned as error, was fully covered by the instructions given, and particularly that portion commencing at the bottom of page 185 and extending to the middle of page 186, as follows:

"In this conneetion it is proper that I direct your attention to the fact that there is evidence tending to show that there was another way of reaching the place and coming from the place where the plaintiff was at work. There is a conflict of evidence upon that point, but there is evidence tending to show that there was such a way, and evidence to rebut it. The defendant contends that this other way was a safe one, that is, the way going by the rock chute or slide. If you find that it was a reasonably safe way, and that plaintiff knew of its existence, and, instead, of

using it, for his own convenience he carelessly used the more dangerous way, then he could not recover, for, as you will see, his injuries would upon that assumption be the result of his own carelessness in taking a dangerous way, and when one reasonably safe was open for his use."

ASSIGNMENT OF ERROR NO. 3.

The refusal to give instruction No. 2 requested by the defendant and covered by assignment No. 3 was not error for the court fully covered the question of assumed risk in his instructions as the same are found at pages 182, 183, 184, 185 and 186 of the Record.

ASSIGNMENT NO. 4.

This assignment of error should not be dignified by argument. The court referred to the fact that some of the jurors had been upon a previous negligence case where the principles of law were in some respects the same and in some respects different and he therefore advised those who had been upon the previous case that they should lay aside any recollection they had thereof. The exception seems to be that it was prejudicial to the defendant to have the jury reminded of a case which some of them had previously tried. The court did it for the purpose apparently of advising them to lay aside any recollection that they had thereof.

ASSIGNMENT NO. 5.

This assignment is to a portion of the instruction of the court upon the question of assumed risk. The court used a very simple example of a case of assumed risk.

Only a portion of the court's instruction upon the question of assumed risk is set forth in the exception. The exception is based:

Upon the proposition that under the instructions of the court the doctrine of assumed risk would not be applied unless the employer called the attention of an employe to the defective condition of an instrument or instrumentality. It is only necessary in answer to this exception to say that a reading of all of the court's instructions upon the question of assumption of risk will show that the question was fairly, fully and intelligently presented to the jury.

ASSIGNMENT NO. 6.

That assignment is to a portion of the instructions, namely, "that the plaintiff cannot recover unless the defendant was negligent and unless such negligence contributed to or caused the accident." The exception taken at the time the instructions were given are shown at page 188 of the record:

"MR. WAYNE: One other exception, if Your Honor please, to the instruction of the Court advising the jury that they must first find whether the defendant was negligent, and, if so, whether the negligence of the defendant was the proximate cause of the injury, or contributed to the injury, our exception being to that portion of the instruction to the effect that they might find for the plaintiff if the negligence of the defendant contributed with his own negligence to his injury.

THE COURT: I didn't intend so to instruct. I thought that when I came to contributory negligence that I expressly instructed them that even though the defendant was negligent, and that negli-

gence contributed to the injury, still, if he was negligent, and his negligence contributed to the injury, he could not recover. Did I not so instruct?"

That the court was quite correct is shown by the fact that in his instructions the question of contributory negligence was covered as follows:

"It is a general rule, and I should say to you that it is a rule adopted by the express statute of this state, and hence is binding upon all of us, if we are law abiding citizens, it is a general rule that even though the defendant is negligent, and that negligence contributes to an injury, if, at the same time, the plaintiff himself, the employe, is guilty of negligence also contributing to the injury, then he, the plaintiff, the employe, cannot recover from his employer. That is what is ordinarily referred to as contributory negligence." (181) * * * *

"However, if it appears to your satisfaction from the evidence as a whole, then it is unimportant from what source the proof of evidence may have come, and as I have already intimated to you, if you find that the plaintiff himself was guilty of negligence in the premises, and that his negligence contributed to his injury, then he cannot recover." (182).

In the record the mining company assigns as error the insufficiency of the evidence to sustain the verdict of the jury and in the brief of plaintiff in error the grounds thereof are set forth as the seventh subdivision of Assignment No. 1. The practice of the Federal Courts does not recognize any such ground for reversal.

Section 1011 Revised Statutes.

Martinton v. Fairbanks, 112 U. S. 670.

Hall v. Houghton, etc., Co. 60 Fed. 350.

The evidence, however, was convincingly favorable to the defendant in error.

We respectfully submit that there are no grounds

for the reversal of this case. The plaintiff in error has had a particularly fair trial. The court in his instructions commented upon the fact that the case had been calmly tried and argued in a commendable way. The verdict is not a large one, considering the character of the injuries.

Respectfully submitted,

JOHN P. GRAY,

WALTER H. HANSON,

Attorneys for Defendant in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN E. MANDERS, as Trustee in Bankruptcy of
the Estates of PETERSON & WILSON, a
Partnership, G. HAZELTON WILSON and
GEORGE PETERSON, Individuals, Bank-
rupts,

Appellants,

vs.

GEORGE H. WILSON and ELLA H. WILSON,
His Wife,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for
the Northern District of California,
First Division.

Filed
17 DECEMBER 1915

R. D. Monckton

No. 2671

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN E. MANDERS, as Trustee in Bankruptcy of
the Estates of PETERSON & WILSON, a
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States, in and
for the Northern District of California. First Di-
vision.*

JOHN E. MANDERS, as Trustee in Bankruptcy of
the Estates of PETERSON & WILSON, a
Partnership, G. HAZELTON WILSON, and
GEORGE PETERSON, Individuals, Bank-
rupts,

Plaintiff,

vs.

GEORGE H. WILSON and ELLA H. WILSON,
His Wife,

Defendants.

**Praeclipe for Transcript of Record for Use on
Appeal.**

To the Clerk of the Above-entitled Court:

Please prepare a transcript of the record in the above-entitled matter to be used by the above-named plaintiff on appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from the judgment of the above-entitled court made and entered herein on the 15th day of September, 1915, sustaining the demurrer of the above-named defendants to the complaint of the plaintiff on file herein and dismissing the said action. Please include in the said transcript of record the following documents:

- (1). This Praeclipe.
- (2). Complaint in the Above-entitled Action.
- (3). The Demurrer of the Defendants in the Above-entitled Action.

(4). Opinion and Order of the District Judge Sustaining the Said Demurrer.

(5). The Judgment in the Above-entitled Action.
Dated, October 2, 1915.

REUBEN G. HUNT,
Attorney for Plaintiff.

Receipt of a copy of the foregoing Praeclipe is hereby admitted this 4th day of October, 1915.

HAROLD L. LEVIN and
H. I. STAFFORD,

Attorneys for Defendants Above Named. [1*]

[Endorsed]: Filed Oct. 6, 1915. W. B. Maling,
Clerk By C. W. Calbreath, Deputy Clerk. [2]

(Title of Court and Cause.)

COMPLAINT TO SET ASIDE DEED.

Now comes the plaintiff above-named and complaining of the defendants above named alleges:

I.

The above-named plaintiff and each of the above-named defendants are citizens of the United States and reside in the City and County of San Francisco, State of California.

II.

The above-entitled action is commenced in the above-entitled court by the above-named trustee in bankruptcy under and by virtue of the provisions of Section 70 (e) of the Bankruptcy Act taken in conjunction with Section 23 (b) of the same Act, for the

*Page-number appearing at foot of page of certified Transcript of Record.

purpose of setting aside the transfer of property hereinafter mentioned.

III.

At and during all the dates and times herein mentioned the New England Casualty Company was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Massachusetts and authorized to do business in, and engaged in business, in the State of California. [3],

IV.

At and during all the dates and times herein mentioned the defendants, George H. Wilson and Ella H. Wilson, were and now are husband and wife.

V.

On the 31st day of October, 1914, a petition in involuntary bankruptcy was filed in the above-entitled court against the above-named bankrupts, and thereafter and on the 26th day of January, 1915, the said Court made an order, which said order was duly given and made, adjudicating the said partnership and the said individuals bankrupts upon the said petition and referring further proceedings in the matter of the administration of the estate of the bankrupts to A. B. Kreft, Esq., a referee in bankruptcy of the said court. Thereafter and on the 27th day of February, 1915, the above-named John E. Manders was appointed trustee of the estates of the said bankrupts by their creditors at their first meeting, which said appointment was thereupon and on said 27th day of February, 1915, approved by the said referee. Thereafter and on the said 27th day of February, 1915, the said John E. Manders qualified as such trustee

and ever since the said 27th day of February, 1915, the said John E. Manders has been, and now is, the appointed, qualified and acting trustee of the estates of the said bankrupts.

VI.

On the 27th day of September, 1911, and for a long time prior thereto, the above-named bankrupt G. Hazelton Wilson was the sole owner of, and in the actual possession of, and appeared upon the records of the hereinafter-mentioned County of Alameda as the sole owner of, and continuously thereafter until the 23d day of October, 1914, appeared upon the said records as the sole owner of, the following described real property situated, lying and being in the City of Oakland, County of Alameda, State of California:

[4]

The North Half of Lot No. 40, Block D, as laid down and delineated upon that certain map entitled: "Highland Terrace Map No. 2," on record in the office of the County Recorder of the County of Alameda, State of California.

Thereafter and on said 27th day of September, 1911, the said bankrupt G. Hazelton Wilson executed and delivered to defendant George H. Wilson, his father, and to defendant Ella H. Wilson, his mother, a deed to the said real property, either in payment of an alleged pre-existing indebtedness of \$2,000.00 or as a mortgage to secure such indebtedness. Whether the said deed was given in payment of such alleged indebtedness or as a mortgage to secure such alleged indebtedness, plaintiff is unable to state. The said deed remained in the possession of the said

George H. Wilson from the said 27th day of September, 1911, until the 23d day of October, 1914, and was not placed on record until the said 23d day of October, 1914, when it was recorded in the office of the County Recorder of the said County of Alameda, in Liber 2294 of Deeds at page 168, records of said Alameda County.

VII.

At and during all the dates and times herein mentioned down to and including the 23d day of October, 1914, the day when the said deed was recorded, the said bankrupt G. Hazelton Wilson was in open, notorious and exclusive possession of the said real property and was the reputed and apparent owner thereof, and neither the said George H. Wilson nor the said Ella H. Wilson ever had possession of the said real property, or any part thereof, or was the reputed or apparent owner thereof, at or during any of said dates or times. The said deed was withheld from record as aforesaid by the said defendant George H. Wilson and the said defendant Ella H. Wilson in order not to affect the credit of the said bankrupt G. Hazelton Wilson, and the credit of the said bankrupt partnership, and in order to enable the said bankrupt partnership to extend its credit, upon the reputed and apparent [5] ownership of the said real property in the said bankrupt G. Hazelton Wilson.

VIII.

On or about the 6th day of July, 1914, the said bankrupt partnership and the said individual bankrupt G. Hazelton Wilson falsely and fraudulently represented to the said corporation that the said

bankrupt partnership was the owner of, without any encumbrance thereon, and in the possession of, the said real property, through and by the said individual bankrupt G. Hazelton Wilson, as was disclosed by the records of Alameda County, and relying solely upon the said representations, and not otherwise, and without any knowledge of their falsity, and without any knowledge of the said transfer mentioned in Paragraph VI above, the said corporation extended credit to the said bankrupt partnership in this: (1). That on the 6th day of July, 1914, it executed its bond No. 17914 on behalf of the said bankrupt partnership in favor of the Board of Education of the City of Santa Cruz, State of California, guaranteeing the faithful performance of a certain contract dated July 3, 1914, entered into between the said Board of Education of the City of Santa Cruz and the said bankrupt partnership for the general construction of a grammar school building to be erected in the said City of Santa Cruz, the penalty of the said bond being \$32,880.00. The said bankrupt partnership failed to properly perform and complete said contract, and the said corporation by reason of the conditions of the said bond was compelled to and did complete said contract, and by reason of the completion of said contract and the giving of said credit the said corporation, prior to the filing of the said petition in bankruptcy, suffered a loss exceeding \$2,500.00, no part of which has been paid to said corporation. On the said 6th day of July, 1914, the time of the execution of the said bond, the bankrupt partnership agreed in writing with

the said corporation to [6] to indemnify the said corporation for all losses it might sustain by reason of the giving of the said bond. (2). That on the 8th day of July, 1914, it executed its bond No. —— on behalf of the said bankrupt partnership in favor of the Board of Trustees of the Town of Yreka, State of California, guaranteeing the faithful performance of a certain contract dated July, 1914, entered into between the said Board of Trustees of the town of Yreka and the said bankrupt partnership for the general construction of a free public library building in the said town of Yreka, the penalty of the said bond being \$7,000. The said bankrupt partnership failed to properly perform and complete said contract, and the said corporation by reason of the conditions of the said bond was compelled to and did complete said contract, and by reason of the completion of said contract and the giving of said credit the said corporation, prior to the filing of the said petition in bankruptcy, suffered a loss exceeding \$2,500.00, no part of which has been paid to said corporation. On the said 8th day of July, 1914, the time of the execution of the said bond, the bankrupt partnership agreed in writing with the said corporation to indemnify the said corporation for all losses it might sustain by reason of the giving of the said bond.

The said corporation did not discover the falsity of the said representations, or the falsity of any of them, until the said 23d day of October, 1914, when the said deed was recorded as aforesaid.

IX.

At and during all the dates and times herein men-

tioned the said real property was, and now is, of a value of about \$2,000.

X.

The total amount of claims filed and allowed against the estate of the bankrupt partnership in the said bankruptcy proceeding exceeds \$2,5000.00, and the total assets of the [7] bankrupt partnership do not exceed \$4,000, and there are no assets in the estate of either individual bankrupt.

XI.

The said defendant George H. Wilson and the said defendant Ella H. Wilson threaten to, and will unless restrained by an order of the above-entitled court, immediately sell, assign, transfer or in some wise dispose of the said real property, or some part thereof to an innocent third party either for value or otherwise, and thereby place the said real property out of the reach of the said trustee in bankruptcy in the event that he is successful in this action.

WHEREFORE, plaintiff plays that an order may issue herein restraining the said defendant George H. Wilson and the said defendant Ella H. Wilson from selling, assigning, transferring, or in anywise disposing of the said real property, or any part thereof, until the further order of this Court; that a decree may be entered herein setting aside and annulling the said transfer and declaring that the said real property is a part and parcel of the estate of the bankrupt partnership; that the said decree may provide that the said defendant George H. Wilson and the said defendant Ella H. Wilson may have ten days in which to execute and deliver to the trustee

in bankruptcy a deed to the said real property, upon the failure of which at the end of said time a commissioner may be appointed by this Court to execute such a transfer on behalf of the said defendants to and for the use of the said trustee in bankruptcy; and for such other and further relief as to the Court shall seem meet and proper, and for the costs of this action

REUBEN G. HUNT,
Attorney for Plaintiff.

(Duly verified.)

[Endorsed]: Filed Jul. 7, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [8]

(Title of Court and Cause.)

Demurrer.

Defendants demur to plaintiff's complaint and specify:

I.

That the said complaint does not state facts sufficient to constitute a cause of action.

II.

That the said complaint is uncertain in this: That it does not appear therein, neither can it be ascertained therefrom, whether or not the defendants had knowledge, or cause to believe, that the grantor, G. Hazelton Wilson, was bankrupt or insolvent at the time of the delivery of the said deed to the said defendants, or that the said defendants or either of them contributed to, or had knowledge of the alleged fraud at the time of the delivery of the said deed, or

at any time thereafter.

III.

That the said complaint is uncertain in this: That it cannot be ascertained therefrom, neither does it appear therein whether or not the said deed was delivered to the defendants [9] with intent to defraud the creditors if the grantor;

IV.

That the said complaint is ambiguous for the same reason as it is uncertain as set forth in paragraphs II and III hereof and that the said complaint is unintelligible for the same reason as it is ambiguous.

WHEREFORE the defendants pray to be hence dismissed with their costs and that the plaintiff take nothing by his complaint herein.

HAROLD L. LEVIN,
H. I. STAFFORD,

Attorneys for the Defendants, George H. Wilson and
Ella Wilson (His Wife).

We hereby certify that the within demurrer is well taken in point of law and is not interposed for purpose of delay.

HAROLD L. LEVIN,
H. I. STAFFORD,
Attorneys for Defendants.

Receipt of Copy of within Demurrer admitted this
23d day of August, 1915.

R. G. HUNT,

Attorney for Plaintiff.

[Endorsed]: Filed Aug. 24, 1915. W. B. Maling,
Clerk By C. W. Calbreath, Deputy Clerk. [10]

(Title of Court and Cause and Number.)

[Opinion and Order Sustaining Demurrer.]

REUBEN G. HUNT, Esq., Attorney for Plaintiff.

HAROLD L. LEVIN, Esq., and H. I. STAFFORD, Esq., Attorneys for Defendants.

This is an action by a trustee in bankruptcy to set aside a deed executed and delivered by the bankrupt to the defendants on September 27th, 1911, but not recorded until October 23d, 1914. There is no fraud alleged in connection with the original execution and delivery of the deed, but it is sought to set it aside upon an allegation that it was withheld from record by the defendants in order not to affect the credit of the grantor, and in order to enable him to extend his credit upon the reputed ownership of the property involved. The complaint also avers that a certain corporation did extend credit to the grantor upon his reputed ownership of the land in question. Section 70-e of the bankruptcy act provides that "a trustee may avoid any transfer by the bankrupt of his property—which any creditor of such bankrupt might have avoided, etc." But of course this means "which any creditor might have avoided" under the laws of the State where the transaction occurred. Whatever may be the rule in other states, [11] or at the common law, no law, nor any decision has been called to my attention which would permit the corporation extending credit to the grantor to avoid a deed not otherwise fraudulent in this State, because of failure

to record it. Indeed it was early held here that failure to record a transfer of real property renders such transfer void only as against subsequent purchasers of incumbrances in good faith and for value.

Section 1214 Civil Code;

Prow vs. Rose, 4 Cal. 173;

Pixley vs. Higgins, 15 Cal. 127.

Nor does there appear in the complaint the necessary elements of an estoppel such as would prevent the defendants from asserting title.

The demurrer to the complaint is therefore sustained.

September 13th, 1915.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Sep. 13, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [12]

(Title of Court and Cause and Number.)

Judgment.

In this cause, the Court having ordered that Defendants Demurrer to the Complaint be sustained, without leave to amend, and that Judgment be entered accordingly:

NOW THEREFORE, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action and that the defendants go hereof without day.

JUDGMENT ENTERED this 13th day of September, A. D. 1915.

W. B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk. [13]

(Title of Court and Cause.)

Petition for Appeal and Order Allowing Appeal.

John E. Manders, as trustee in bankruptcy of the estates of Peterson & Wilson, a partnership, and G. Hazelton Wilson and George Peterson, Individuals, Bankrupts, the plaintiff above named, considering himself aggrieved by the judgment of the above-entitled court made and entered on Tuesday, the 15th day of September, 1915, in the above-entitled action sustaining the demurrer of the above-named defendants to the complaint of the plaintiff on file herein and dismissing the said action, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the Assignment of Errors which is filed herewith, and he prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which the said judgment was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated, October 2, 1915.

REUBEN G. HUNT,
Attorney for Plaintiff. [14]

The foregoing appeal is allowed.

Dated, October 2d, 1915.

M. T. DOOLING,
District Judge.

[Endorsed]: Filed Oct. 2, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [15]

(Title of Court and Cause.)

Assignment of Errors on Appeal.

Now on this the 1st day of October, 1915, comes John E. Manders, as trustee in bankruptcy of the estates of Peterson & Wilson, as partnership, G. Hazelton Wilson and George Peterson, Individuals, Bankrupts, the plaintiff in the above-entitled action, by Reuben G. Hunt, his attorney, and says that the judgment in the above-entitled action made and entered herein on the 15th day of September, 1915, sustaining the demurrer of the above-named defendants to the complaint of the plaintiff on file herein and dismissing the said action, is erroneous and against his just right for the following reasons:

(1) Said complaint states facts sufficient to constitute a cause of action against the above-named defendants.

(2) It was not necessary in order to state facts sufficient to constitute a cause of action that said complaint should have alleged that the grantor of the deed named in said complaint, to wit, the bankrupt G. Hazelton Wilson, was insolvent at the time of the delivery of the said deed to the above-named defendants.

(3) It was not necessary in order to state facts sufficient [16] to constitute a cause of action that said complaint should have alleged that the above-named defendants or either of them, contributed to, or had knowledge, of the fraud set forth in the said complaint at the time of the delivery of the said deed, or at any time thereafter.

(4). It was not necessary in order to state facts sufficient to constitute a cause of action that the said complaint should have alleged that the said deed was delivered to the defendants with intent to defraud the creditors of the said grantor, the bankrupt G. Hazelton Wilson.

(5). The said complaint was not uncertain because it lacked the allegations contained in 2, 3, or 4 above or any of them.

(6). The said complaint was not ambiguous because it lacked the allegations contained in 2, 3 or 4 above or any of them.

WHEREFORE, the said John E. Manders, as trustee in bankruptcy of the estates of Peterson & Wilson, a partnership, and G. Hazelton Wilson and George Peterson, Individuals, Bankrupts, the plaintiff in the above-entitled action, prays that the said judgment of the said District Court may be reversed, with directions to said District Court to overrule the said demurrer and require the above-named defendants to answer the said complaint.

Dated, October 2, 1915.

REUBEN G. HUNT,
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 2, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [17]

(Title of Court and Cause and Number.)

Admission of Service of Citation on Appeal.

Due service of the Citation on Appeal herein, the original of which was filed in the above-entitled court on October 2, 1915, is hereby admitted this 2d day of October, 1915.

HAROLD L. LEVIN and
H. I. STAFFORD,

Attorneys for the Above-named Defendants.

[Endorsed]: Filed Oct. 15, 1915, at 4 o'clock and 30 min. P. M. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [18]

(Title of Court and Cause.)

Stipulation for Diminution of Record.

It is hereby stipulated and agreed by and between the parties to the above-entitled action that in making up the record on appeal by the above-named plaintiff from the judgment of the above-entitled court made and entered herein on the 15th day of September, 1915, sustaining the demurrer of the above-named defendants to the complaint of the plaintiff on file herein and dismissing the said action, the clerk of the above-entitled court shall in following the Praecept now on file herein omit the full title of court and cause except upon the said Praecept and thereafter refer to the same simply as "Title of Court

and Cause" and omit all verifications and refer to the same simply as "Duly Verified."

Dated, October 2, 1915.

REUBEN G. HUNT,

Attorney for Plaintiff.

HARROLD L. LEVIN,

H. I. STAFFORD,

Attorneys for Defendants.

[Endorsed]: Filed Oct. 6, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [19]

**Certificate of Clerk, U. S. District Court to
Transcript on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing 19 pages, numbered from 1 to 19, inclusive, to contain full, true, and correct copies of certain records and proceedings in the case of John E. Manders, as Trustee, etc., vs. George H. Wilson and Ella H. Wilson, His Wife, No. 15,852, as the same now remain on file and of record in this office; said copies having been prepared pursuant to and in accordance with "Praeclipe for Transcript of Record for use on Appeal" (a copy of which is included in the foregoing transcript), and the instructions of Reuben G. Hunt, Esq., Attorney for Plaintiff herein.

I further certify that the cost for preparing and certifying the foregoing copies is the sum of Seven Dollars and sixty cents (\$7.60), and that the same has been paid to me by said attorney for plaintiff.

Annexed hereto and paged 21, 22, and 23, is the original Citation on Appeal, issued herein.

WITNESS the Honorable M. T. DOOLING, Judge of the District Court of the United States, for the Northern District of California, this 28th day of October, A. D. 1915.

WALTER B. MALING,
Clerk,
By C. W. Calbreath,
Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled
10/28/15. C. W. C.] [20]

*In the District Court of the United States in and for
the Northern District of California, First Di-
vision.*

JOHN E. MANDERS, as Trustee in Bankruptcy of
the Estates of PETERSON & WILSON, a
Partnership, G. HAZELTON WILSON and
GEORGE PETERSON, Individuals, Bank-
rupts,

Plaintiffs,

vs.

GEORGE H. WILSON and ELLA H. WILSON,
his Wife,

Defendants.

Citation on Appeal.

United States of America,

Ninth Circuit.—ss.

To George H. Wilson and Ella H. Wilson, his wife,
Defendants Above Named, and to H. I. Stafford
and Harold Levin, Their Attorneys:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City and County of San Francisco, in said district, on the 30th day of October, 1915, pursuant to a petition for appeal and assignment of errors filed in the clerk's office of the District Court of the United States in and for the Northern District of California, First Division, in the above-entitled matter, to show cause, if any there be, why the judgment of the said District Court rendered, made and entered herein on the 15th day of September, 1915, sustaining the demurrer of the above-named defendants to the complaint of the plaintiff on file herein and dismissing the said action, as in said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf. [21]

WITNESS, the Honorable M. T. DOOLING, Judge of said District Court this 2d day of October, 1915, in the year of Our Lord one thousand nine hundred and fifteen and in the independence of the United

States of America the one hundred and fortieth.

M. T. DOOLING,
United States District Judge.

Attorneys for the Above-named Defendants. [22]

[Endorsed]: 15,852. U. S. District Court, Northern District of California, First Division. John E. Manders, etc., Plaintiff, vs. George H. Wilson, et al., Defendants. Citation on Appeal. Filed Oct. 2, 1915. W. B. Maling, Clerk. My C. W. Calbreath Deputy Clerk. [23]

[Endorsed]: No. 2671. United States Circuit Court of Appeals for the Ninth Circuit. John E. Manders, as Trustee in Bankruptcy of the Estates of Peterson & Wilson, a Partnership, G. Hazelton Wilson and George Peterson, Individuals, Bankrupts, Appellants, vs. George H. Wilson and Ella H. Wilson, His Wife, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Filed October 28, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

JOHN E. MANDERS, as trustee in bankruptcy
of the estates of Peterson & Wilson, a
partnership, and G. Hazelton Wilson and
George Peterson, individuals, bankrupts,
Appellant,

vs.

GEORGE H. WILSON and ELLA H. WILSON
(his wife),

Appellees.

BRIEF FOR APPELLANT.

REUBEN G. HUNT,

Attorney for Appellant.

Filed

May 16 1916

Filed this.....day of May, 1916. F. D. Monckton,

Clerk

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2671

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

JOHN E. MANDERS, as trustee in bankruptcy
of the estates of Peterson & Wilson, a
partnership, and G. Hazelton Wilson and
George Peterson, individuals, bankrupts,
Appellant,

vs.

GEORGE H. WILSON and ELLA H. WILSON
(his wife),
Appellees.

BRIEF FOR APPELLANT.

Statement of the Case.

This is an appeal from the judgment of the District Court for the Northern District of California sustaining a demurrer to appellant's complaint and dismissing an action brought by appellant, as trustee in bankruptcy, for the purpose of setting aside a certain transfer of real property, under the provisions of Sec. 70e of the Bankruptcy Act taken in conjunction with Sec. 23b of the same act.

The complaint alleges, in substance, as follows:

That the appellees are husband and wife, and the individual bankrupt G. Hazelton Wilson is their son; that appellant is the duly appointed, qualified and acting trustee in bankruptcy of the estates of Peterson & Wilson, a partnership, and of the said G. Hazelton Wilson and George Peterson, individuals and members of the partnership;

That on the 27th day of September, 1911, and for a long time prior thereto, the said individual bankrupt G. Hazelton Wilson was the sole owner of, and in the actual possession of, the real property involved, and appeared upon the records as such owner, and continuously thereafter until the 23rd day of October, 1914, appeared upon such records as such sole owner;

That on the said 27th day of September, 1911, the said individual bankrupt G. Hazelton Wilson executed and delivered to the appellees a deed to this real property either in payment of an antecedent indebtedness of \$2000.00 or as a mortgage to secure the repayment of the same; that this deed remained in the possession of appellee George H. Wilson from the said 27th day of September, 1911, until the said 23rd day of October, 1914, when it was recorded for the first time; that from said 27th day of September, 1911, until said 23rd day of October, 1914, a period of three years, the said individual bankrupt G. Hazelton Wilson was in the open, notorious and exclusive possession of the said

real property and the reputed and apparent owner thereof;

That appellees did not have possession of the said real property, or any part thereof, and were not the reputed or apparent owners, until after the said 23rd day of October, 1914; that appellees withheld the said deed from record in order not to affect the credit of the said individual bankrupt G. Hazelton Wilson, or the credit of the said bankrupt partnership, and in order to enable the said bankrupt partnership to extend its credit upon the reputed and apparent ownership of the property in the said individual bankrupt G. Hazelton Wilson;

That on the 6th day of July, 1914, the said bankrupt partnership and the said individual bankrupt G. Hazelton Wilson falsely and fraudulently represented to the New England Casualty Co., a corporation, that the said bankrupt partnership was the owner of, and in the possession of, the said real property, without any encumbrance thereon, through and by the said individual bankrupt G. Hazelton Wilson, as disclosed by the record; and that, relying upon the said representation, and not otherwise, and without knowledge of its falsity, the said corporation extended credit to the said bankrupt partnership, but, prior to bankruptcy and the recording of the deed, suffered loss by reason of such extension of credit, not discovering the falsity of the representation until the recording of the deed as aforesaid;

That the real property involved is worth about \$2000; and that the assets of the bankruptcy estates are insufficient to pay the creditors in full.

To this complaint, the appellees interposed a general and special demurrer, but this demurrer raised but one point, namely, that no fraud is alleged in connection with the original execution and delivery of the deed, and that, therefore, the complaint does not state facts sufficient to constitute a cause of action.

Brief of the Argument.

I. A deed not at first fraudulent may afterwards become so if withheld from record for the purpose of enabling the grantor to extend his credit upon his apparent unencumbered ownership of the property as disclosed by the record.

National Bank of Athens v. Shackelford, 31

Am. B. R. 464, 208 Fed. Rep. 677;

Peterson v. Mettler, 29 Am. B. R. 160, 162,
198 Fed. Rep. 938;

Blennerhasset v. Sherman, 105 U. S. 100,
26 Law Ed. 1080, and cases there cited and
discussed;

Adams v. Curtis, 36 N. E. Rep. 1095, 1097;
Clayton v. Exchange Bank of Macon, 10 Am.

B. R. 178, 179, 121 Fed. Rep. 630;

Bank of the U. S. v. Housman et al. (N. Y.),
6 Paige Ch. 526, 538;

Political Code of Cal., Sec. 1214.

II. Necessary elements of estoppel such as would prevent appellees from asserting title are set forth in the complaint.

Bashore v. Parker, 146 Cal. 525, 530;
 Code of Civ. Proc. of Cal., Sec. 1962, Subd. 3;
 16 Cyc., 774;
 Filipini v. Trobock, 134 Cal. 441.

III. The transfer was one that any creditor of the bankrupt might have avoided in the California courts had bankruptcy not intervened, and comes, therefore, within the purview of Section 70e of the Bankruptcy Act.

Bankruptcy Act, Sec. 70e;
 Civ. Code of Cal., Sec. 1214;
 Political Code of Cal., Sec. 4468;
 Bush v. Helbing, 134 Cal. 676, 681.

Argument.

I.

A DEED NOT AT FIRST FRAUDULENT MAY AFTERWARDS BE COME SO IF WITHHELD FROM RECORD FOR THE PURPOSE OF ENABLING THE GRANTOR TO EXTEND HIS CREDIT UPON HIS APPARENT UNENCUMBERED OWNERSHIP OF THE PROPERTY AS DISCLOSED BY THE RECORD.

That this is the rule of the English Common Law, and also of many of the States, appears from an examination of the authorities which we cited on page 4 above in the brief of the argument.

In the case of Hungerford v. Earle, 2 Vern. 261, it was held that

“a deed not at first fraudulent may afterwards become so by being concealed or not pursued, by which means creditors are drawn in to lend their money”.

This case is typical of the other English cases upon the subject.

In this country, a typical case is that of Peterson v. Mettler, 29 Am. B. R. 160, 162; 198 Fed. Rep. 938, where the court, at pp. 939, 940 of 198 Fed. Rep. said:

“While the evidence tends to show that there was an actual agreement between Simon and Carl to withhold the deeds from record, cases even go so far as to hold that such an agreement is not necessarily present to empower the trustee to set aside the conveyance.

With the transfer of the property kept off the records for a most unreasonable time, whether wilfully and according to agreement between the two brothers, as appears from the record, or negligently, as Carl would have us believe, with no visible change in the possession of the property, and with creditors advancing money on the faith of the record and representations of Simon, the way would be open to the deceitful and fraudulent, so that property rights would be insecure.”

The District Judge, in his opinion in the case at bar, said:

“Whatever may be the rule in other states, or at the common law, no law, nor any decision

has been called to my attention which would permit the corporation extending credit to the grantor to avoid a deed not otherwise fraudulent in this State, because of failure to record it" (Trans. p. 11).

In this statement, he overlooks the fact that the fraud alleged in the complaint is not merely the failure to record, but the failure to record in order not to affect the credit of the grantor, and in order to enable him to extend his credit upon the reputed ownership of the property involved (Trans. p. 5 and p. 11).

He also overlooks the further fact that there is no law or decision in California that *denies* relief for the species of fraud alleged in the complaint, and that, in this situation, the rule of the English Common Law furnishes the law of the case, by reason of the express provision of Sec. 4468 of the Political Code of California, which provides:

"The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of this State, is the rule of decision in all courts of this State."

It is apparent, therefore, that in the absence of any law or decision to the contrary in California, and this must be admitted by appellees for there is no such law or decision to be found, that the rule of the English common law must prevail: the rule expressed in in the cases of Hungerford v. Earle, *supra*, and Peterson v. Mettler, *supra*.

II.

NECESSARY ELEMENTS OF ESTOPPEL SUCH AS WOULD PREVENT APPELLEES FROM ASSERTING TITLE ARE SET FORTH IN THE COMPLAINT.

The District Judge in his opinion in the case at bar said (Trans. p. 12) :

“Nor does there appear in the complaint the necessary elements of an estoppel such as would prevent the defendants from asserting title”.

What are the necessary elements of an estoppel? In the case of *Bashore v. Parker*, 146 Cal. 525, it was said at p. 530:

“The instruction, moreover, eliminates from consideration the necessary elements of an estoppel as laid down by Subdivision 3 of Section 1926 of the Code of Civil Procedure.”

This subdivision provides:

“Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it”.

Now what are the facts alleged in the case at bar? It is alleged (Trans. pp. 4-5) :

“On the 27th day of September, 1911, and for a long time prior thereto, the above-named bankrupt G. Hazelton Wilson was the sole owner of, and in the actual possession of, and appeared upon the records of the hereinafter-mentioned County of Alameda as the sole owner of, and continuously thereafter until the 23rd day of October, 1914, appeared upon the said

records as the sole owner of, the following described real property (here follows description, the property being in Alameda County, California).

Thereafter and on said 27th day of September, 1911, the said bankrupt G. Hazelton Wilson executed and delivered to defendant George H. Wilson, his father, and to defendant Ella H. Wilson, his mother, a deed to the said real property. * * * The said deed remained in the possession of the said George H. Wilson from the said 27th day of September, 1911, until the 23rd day of October, 1914, and was not placed on record until the said 23rd day of October, 1914, when it was recorded in the office of the County Recorder of said County of Alameda.

* * *

At and during all the dates and times herein mentioned down to and including the 23rd day of October, 1914, the day when the said deed was recorded, the said bankrupt G. Hazelton Wilson was in open, notorious and exclusive possession of the said real property and was the reputed and apparent owner thereof, and neither the said George H. Wilson nor the said Ella H. Wilson ever had possession of the said real property, or was the reputed or apparent owner thereof, at or during any of said dates or times. The said deed was withheld from record as aforesaid by the said defendant George H. Wilson and the said defendant Ella H. Wilson in order not to affect the credit of the said bankrupt G. Hazelton Wilson, and the credit of the said bankrupt partnership, and in order to enable the said bankrupt partnership to extend its credit upon the reputed and apparent ownership of the said real property in the said bankrupt G. Hazelton Wilson."

Are these allegations not equivalent to a statement that appellees intentionally and deliberately omitted to record the deed in order to lead the creditors of the bankrupts to believe that a particular thing was true, to-wit: The property belonged to the bankrupts?

It is further shown in paragraph VIII of the complaint (Trans. pp. 5-8) that a creditor of the bankrupts was misled into believing, by reason of such failure to record, that the property belonged to the bankrupts, and that, acting in good faith upon this belief, it extended credit to the bankrupts, something it would not have done had it known the true state of affairs, and that by reason of such extension of credit it suffered loss prior to the bankruptcy proceedings.

The rule is stated in Cyc. as follows (16 Cyc. 774):

“The owner of real property may, by clothing another with an apparent title thereto, or with an apparent authority over it, estop himself to deny such title or authority.”

See also the case of *Filipini v. Trobock*, 134 Cal. 441.

We submit, therefore, that, in view of the allegations of the complaint and these authorities, the District Judge was in error in his conclusion that the necessary elements of an estoppel were not set forth.

III.

THE TRANSFER WAS ONE THAT ANY CREDITOR OF THE BANKRUPT MIGHT HAVE AVOIDED IN THE CALIFORNIA COURTS HAD BANKRUPTCY NOT INTERVENED, AND COMES, THEREFORE, WITHIN THE PURVIEW OF SECTION 70e OF THE BANKRUPTCY ACT.

Sec. 70e of the Bankruptcy Act provides as follows:

“The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication.”

This, of course, means “which any creditor of such bankrupt might have avoided” under the laws of the State where the transaction occurred, which, in the case at bar, is California. The District Judge in his opinion in the case at bar (Trans. pp. 11-12) stated that:

“Whatever may be the rule in other states, or at the common law, no law, nor any decision has been called to my attention which would permit the corporation extending credit to the grantor to avoid a deed not otherwise fraudulent in this State, because of failure to record it. Indeed it was early held here that failure to record a transfer of real property renders such transfer void only as against subsequent purchasers or incumbrancers in good faith and for value. Section 1214, Civil Code; Prow v. Rose, 4 Cal. 173; Pixley v. Higgins, 15 Cal. 127.”

Section 1214 of the Civil Code, referred to by the District Judge, provides:

“Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action.”

Evidently the District Judge assumed that this section applied to all cases, irrespective of whether fraud was present or not. Section 3439 of the Civil Code of California provides:

“Every transfer of property or charge made thereon, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor”.

If the theory of the District Judge be correct, therefore, an unrecorded deed would not be void as against a creditor, even though the transfer was made with intent to delay or defraud, because he is not a subsequent purchaser or encumbrancer.

It was held in the case of *Bush v. Helbing*, 134 Cal. 676, 681, that the fact that a deed is kept secret and not recorded is a very potent badge of fraud,

and this was one of the principal grounds in that case for the avoidance of the deed in question by the attacking creditor. Yet if the theory of the District Judge be correct, the attacking creditor in that case would have no standing by reason of the non-recording of the deed, because he was not a subsequent purchaser or encumbrancer.

It is quite apparent that the District Judge was mistaken in his theory. Sec. 1214 of the Civil Code was not intended to be exclusive, or else Sec. 3439 would not have been enacted; and Sec. 1214 plainly does not apply to cases where fraud is present.

It is true that Sec. 3439 applies only to fraud in the inception of the transaction, and not to a situation like the one in the case at bar. There is no statute upon the subject in California, nor is there any decision of its courts bearing upon the question, unless it be certain statements in the case of *Bush v. Helbing*, 134 Cal. 676, where it is said at p. 681:

“The fact that a deed is kept secret and not recorded is a very potent badge of fraud. In *Francis v. Lawrence*, 48 N. J. Eq. 511, the wife retained a deed, and the husband obtained credit by representing that he was the owner of the house and lot conveyed. In speaking of the transaction the court said: ‘At the time of these representations, except the first, his wife was in possession of a conveyance of the property from him to his brother-in-law, for the purpose of vesting the title in her name. The deed was not delivered to the grantee and not placed upon the record, but was held by the wife, and the husband was thus enabled to trade upon the false credit which he acquired by

being the apparent owner of the property, while the deed was ready to be put upon the record at a moment's notice. * * * This transaction cannot be regarded in any other light than as a fraud upon the creditors.' * * *

* * * It is said by Bigelow (Vol. 2, p. 365): The case would be different, however, if the creditors were induced to give credit on the faith of the ownership of the possessor, where the real owner has neglected to put his deed on record. It is enough to bar the claim of the owner that his neglect or (to avoid any possible misunderstanding) his omission has contributed to the deception of the creditors."

Does the lack of a law or a decision upon the subject in California preclude the creditors, as claimed by the District Judge? Sec. 4468 of the Political Code of California provides:

"The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of this State, is the rule of decision in all the courts of this State."

As we have seen (p. 5 of this brief), under the common law a transfer not at first fraudulent may afterwards become so where it is kept off the records for a most unreasonable time, with no visible change in the possession of the property and with creditors advancing money upon the faith of the record.

This rule of the common law, then, would be the rule of the California courts in the absence of any law or decision to the contrary. We have been

unable to find any such law or decision and are quite confident that appellees will have the same difficulty. On the contrary, the statements in the case of *Bush v. Helbing* above referred to, while they may be dicta, indicate that the California Supreme Court, if called upon to decide the question presented here, would decide squarely in our favor.

CONCLUSION.

In conclusion we submit that, in view of the foregoing, the judgment of the District Judge should be reversed, with directions to overrule the demurrer and give the appellees leave to answer the complaint, if they so desire; and that appellant should be awarded his costs upon this appeal.

Dated, San Francisco,
May 5, 1916.

REUBEN G. HUNT,
Attorney for Appellant.

No. 2671

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN E. MANDERS, as trustee in bankruptcy
of the estates of Peterson & Wilson, a
partnership, and G. Hazelton Wilson and
George Peterson, individuals, bankrupts,
Appellant,
vs.

GEORGE H. WILSON and ELLA H. WILSON
(his wife),
Appellees.

BRIEF FOR APPELLEES.

HAROLD L. LEVIN,
H. I. STAFFORD,

Attorneys for Appellees.

Filed this day of May, 1916.

MAY 1 1916
F. D. Monckton

FRANK D. MONCKTON, Clerk. , Clerk

By Deputy Clerk.

No. 2671

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

JOHN E. MANDERS, as trustee in bankruptcy
of the estates of Peterson & Wilson, a
partnership, and G. Hazelton Wilson and
George Peterson, individuals, bankrupts,
Appellant,

vs.

GEORGE H. WILSON and ELLA H. WILSON
(his wife),
Appellees.

BRIEF FOR APPELLEES.

Statement of the Case.

Appellants have appealed from the judgment of the District Court for the Northern District of California sustaining a demurrer to the appellant's complaint and dismissing an action brought by the appellant, as trustee in bankruptcy, for the purpose of setting aside a certain transfer of real property, under the Bankruptcy Act.

The undisputed facts of the case are as follows:

That on the 27th day of September, 1911, the bankrupt, G. Hazelton Wilson was the owner of a certain lot of land and was in the actual possession of, the said real property, which was located in Oakland, California.

That on the said 27th day of September, 1911, the said G. Hazelton Wilson, for a valuable consideration, conveyed the said land by a deed, properly acknowledged before a notary, to George H. Wilson and Ella H. Wilson, his wife, the appellees in the case at bar.

That the appellees did not record the deed until the 23rd day of October, 1914, and within four (4) months from the date of the adjudication of bankruptcy of G. Hazelton Wilson, which order of adjudication was made on the 26th day of January, 1915.

That the complaint of the appellant fails to allege that at the time of the delivery or making the aforementioned conveyance, there was any fraud or that the appellees (the grantees) had knowledge or cause to believe that their grantor, G. Hazelton Wilson, bankrupt, was insolvent, or at the time of the conveyance or delivery of the deed, the appellees (grantees) had knowledge of the alleged fraud or in anywise contributed to the alleged fraud; in other words there is nothing in the complaint of appellant to show that in its inception and at the time of making and delivery of the

deed, the appellees (grantees) had notice of intended fraud or in anywise contributed to it.

The sole question in case at bar is: Does a deed, properly acknowledged before a notary public, made, executed and delivered for a valuable consideration, prior to the four months' period of time of the adjudication of the grantor in bankruptcy, become void as to creditors of the bankrupt, if it is not recorded by grantee until within the four months' period? Appellees contend that deed does not become void for the creditors (Trustee in Bankruptcy); has no better rights than the debtor (grantor) but merely stands in the shoes of the debtor (grantor).

Brief of Argument.

POINTS AND AUTHORITIES IN SUPPORT OF APPELLEES' CONTENTIONS.

I.

That the grantors (trustee in bankruptcy) under the California law have no greater rights than their debtor and a deed, although delivered and unrecorded is as good to everyone, except bona fide purchasers for value and without notice.

Section 1214 Civil Code of the State of California;

Prow v. Rose, 4 Cal. 173;

Pixley v. Higgins, 15 Cal. 127.

In further support of the above, we respectfully call the Court's attention to the case of Carey v.

Donohue, decided by the *Supreme Court of the United States on the 13th day of March, 1916*, and reported in the United States Supreme Court Advance Opinions, 1915, in Volume Ten (10), page 386, which case is practically on all fours with the case at bar and involving the same subject matter.

We therefore respectfully deal at length and quote from the said case:

Mr. Justice Hughes delivering the opinion of the Court says:

"The sole question presented for the consideration of this Court is whether the deed, executed by the bankrupt, was one which was required to be recorded within the meaning of this section, if it was not there could be no recovery of the property under section Sixty (60) of the bankruptcy act as the deed was executed and delivered more than four (4) months before the petition in bankruptcy was filed. If the deed was required to be recorded in the sense of the statute, it is clear that the trustee was entitled to recover as the recording was within the four (4) months period and the other condition of recovery were satisfied."

The provisions for the recording of the deed is found in Section 8543 of the General Code of Ohio, which section is as follows:

"All other deeds and instruments in writing for the conveyance or encumbrance of lands, tenements, or hereditaments executed agreeably to the provisions of this chapter, shall be recorded in the office of the county in which the premises are situated and until so recorded or filed for record shall be deemed fraudulent so far as relates to a specific bona fide purchaser"

having at the time of the purchase no knowledge of the existence of such former deed or instrument.”

* * * * *

“This provision of the statute must be accepted as exclusively defining the consequences which follow a failure to file a deed for record and there being mere neglect unaccompanied by any fraudulent conduct or representation on the part of the grantee no right can accrue to anyone other than such bona fide purchasers.”

Accordingly it was held that *the mere failure to record a deed did not render it invalid as to the creditors of the grantor although it became such on the faith of his representation.*

See decisions cited in the case.

Under these decisions then we assume that there was no requirement that this conveyance should be recorded in order to give it validity as against any creditor of the bankrupt whether a general creditor or a lien creditor or a judgment creditor with execution open and unsatisfied, that is, as against any class of persons represented by the trustee or they whose rights, remedies and powers he may be deemed to be invested.

Bankruptcy Act, Section 47a.

In reading of the above case it is plainly manifest that the Ohio section hereinbefore referred to is substantially

that of the California section, to wit, Section 1214 which is as follows, to wit:

“Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action.”

The appellees will not further burden the Court by attempting to differentiate or distinguish the case cited by the appellant but will suffice it to say that counsel for the appellees concede the cases cited by the appellant to be the law *but they are not applicable to the case at bar.*

In conclusion the appellees desire to call the Court's attention to the following:

I.

(a) In a pleading, attacking a conveyance as fraudulent towards grantor's creditors, it is not sufficient to allege the fraud in general terms but the facts constituting fraud must be stated.

Hiller v. Dyerville Mfg. Co., 116 Cal. 134;
Cosgrove v. Fisk, 90 Cal. 75;
Kinder v. Macy, 7 Cal. 206.

(b) The fact that the deed was made by a father to a daughter without consideration does not of itself raise a presumption of fraud.

Smith v. Mason, 122 Cal. 426.

(c) The complaint alleges a consideration for a conveyance therefor if there is a valuable consideration for the conveyance knowledge of fraud and intent of grantee is immaterial.

Roos v. Wellman, 102 Cal. 1.

(d) *A transfer by insolvent debtor cannot be vacated because of fraud of seller in which the purchaser had no part and of which he had no notice.*

Grunsky v. Parlin, 110 Cal. 179.

(e) The complaint does not in anywise show that the alleged false representations of grantor were made with intent to defraud his creditors, or that the said conveyance was at the time of its delivery, made with intent to defraud creditors.

**FRAUDULENT INTENT IS A FACT WHICH MUST BE ALLEGED
OR COMPLAINT IS DEMURRABLE.**

Vance Estate, 141 Cal. 627;

Fenny v. Howard, 79 Cal. 525;

Colorado Springs v. Wright, 96 Pac. 206.

To constitute a transfer of property fraudulent in fact as against creditors it must be made with the intent on the part of debtor to defraud, delay and hinder creditors.

Bull v. Bray, 89 Cal. 286;

Windhaus v. Booth, 92 Cal. 617.

Conclusion.

We therefore respectfully submit in view of the foregoing that the judgment of the District Judge should be sustained and that the appellees should be awarded their costs upon this appeal.

Dated, San Francisco,

May 15, 1916.

HAROLD L. LEVIN,

H. I. STAFFORD,

Attorneys for Appellees.

